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Two courts have recently passed upon the controverted question as to the right of a beneficiary to inherit from or profit by the death of one whom he has killed—the Supreme Court of Pennsylvania in *In re* Carpenter's Estate and the Supreme Court of Illinois in Holdom v. Grand Lodge, etc. In the former case it was held that since the constitution of that State, Art. 1, § 18, declares that no person shall be attainted of felony, and § 19, provides that no attainder shall work corruption of blood, nor forfeiture of estate, except during the life of the offender, and since the statute of descent and distribution enacts that on the death of a person his estate shall vest in his children, in the absence of a will, a son who murders his father in order to get immediate possession of his share of the father's estate becomes vested with that share, in the absence of a will. Williams, J., dissented from this ruling. In the Illinois case it was held that where an insane beneficiary in a life policy kills the assured under such circumstances as would cause the killing to be a murder, if the beneficiary was sane, such killing does not cause a forfeiture of the policy, nor bar his right of recovery for the insurance money. The Pennsylvania case at least is in accord with the weight of authority and the logic of law. The only exception to this conclusion is in New York, the Court of Appeals of that State in Riggs v. Palmer, 115 N. Y. 506, holding that a murderer cannot inherit from his victim. Against that view, however, may now be cited Cleaver v. Mut. Res. Fund Life Ass'n, 1 Q. B. 147; Owens v. Owens, 100 N. C. 240; Deem v. Millikin, 6 Ohio Cir. Ct. 357, and Shellenberger v. Ransom, 41 Neb. 631, reversing 31 Neb. 61. In the case last cited the court was misled by a failure to closely criticise the case of Riggs v. Palmer on which it rested its decision and on rehearing acknowledges that fact. In editorials in this JOURNAL, at the time of the decisions in the New York and Nebraska cases (29 Cent. L. J. 461; 32 Cent. L. J. 333; 34 Cent. L. J. 247; 39 Cent. L. J. 217), we criticised the reasoning of the New York court and suggested the necessity of a statutory provision to cover such cases. Though the conclusion of the court in the Illinois case was undoubtedly correct, a distinction must be noted between cases where, as in that case, the killing was by an insane beneficiary in a life insurance policy and where the beneficiary is sane and the killing a felonious one, for it has been authoritatively held that the beneficiary in a life insurance policy cannot recover if he has feloniously caused the death of the assured nor can his assignee do so. New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591. But this is because the right in such a case is founded upon contract not upon law. This point was admitted by the English Court of Appeal in Cleaver v. Mut. Res. Fund Life Ass'n, *supra*, while at the same time it held that as the wife could not take by reason of her crime, the insurance money became part of the estate of the insured, and went to her as his legal representative.

The application of the Act of Congress of 1888 directed against the mailing of threatening letters and envelopes of what is known as a "dunning" character, has given courts considerable difficulty, it being often a nice question to determine what constitutes threatening or "dunning" letters. United States District Judge Butler, of Pennsylvania, has lately had a question of this kind. The case was United States v. Dodge, and the court held the defendant for trial for sending a dunning envelope, black in color, but addressed in white letters, through the mail, on the ground that the envelope contained a delineation of a defamatory or threatening character within the meaning of the Act of 1888. The court very properly reasoned that if the fact that a dunning letter is contained in an envelope may be expressed by a figure or other sign impressed upon it, of a character recognized as bearing such expression, by those who may see it, such figure or sign is a "delineation" within the meaning of the statute. There can be no doubt that if it is a matter of common knowledge that a black envelope addressed in white letters signifies to those who may see it that the letter inclosed is a third demand of an overdue debt, a dunning letter, the use of this device is within the purview of the statute. The use

of language signifying the same thing would be no more objectionable or effective for the purpose in view. By resorting to the device the defendant acknowledges that its signification is so understood; if it was not, he would have no object to accomplish in using it. His purpose, as before stated, is to coerce those addressed to pay money by subjecting them to the threat and danger of such exposure. There could be no exposure if the significance of the device was not understood. It is, therefore, a "delineation" within the terms of the statute. Whether it is calculated to affect the character of the person addressed injuriously is a question for the jury. The court said that the term "display" used in the statute "does not tend to limit the terms which precede it. This term is applicable to the word 'delineation' as it is to writing or printing. It is unimportant that the signification or device may be confined to the post office employees. They alone would see the writing or printing if this method of expressing the same thing was employed."

NOTES OF RECENT DECISIONS.

CHATTEL MORTGAGE—POWER IN MORTGAGOR TO SELL.—The Supreme Court of Oklahoma in the case of Bank of Perry v. Cooke, 41 Pac. Rep. 628, considered for the first time the question as to the effect of stipulation in chattel mortgage allowing the mortgagor to remain in possession and sell the mortgaged property; the holding of the court being in accordance with the weight of authority and to the effect that where, at the time of the execution of a chattel mortgage, it is understood and agreed between the parties that the mortgagor shall be allowed to remain in possession of the mortgaged property, and sell and dispose of the same in the ordinary course of trade, and apply the proceeds to his own use, the mortgage is absolutely void as to creditors of the mortgagor, and that it does not matter whether such agreement, is oral or in writing, contained within the mortgage or without; if such an agreement was had, the mortgage is fraudulent and void as to creditors. The following from the long opinion of Scott, J., presents an exhaustive review of the cases on the subject:

This question has never been definitely settled in this court, and therefore we should with care endeavor to arrive at the proper conclusion in the matter. Courts have disagreed upon the question involved, and there is a great mass of irreconcilable decisions on the subject. It is impossible to harmonize them, and it will be useless for us to try to do so. We will simply try to arrive at a just conclusion in the matter, and have our opinion supported by the weight of authority and the better reasoning on the subject as we take it.

Chief Justice Bronson, in Griswold v. Sheldon, 4 N. Y. 581, early announced the doctrine that a mortgage of the character in question was fraudulent and void. While the decision of the court was not unanimously concurred in, yet since that time the doctrine has been well settled in that State. The chief justice in that case says: "But if the intention to allow Burdick to dispose of the mortgaged property as owner cannot be gathered from the face of the deed, still the goods were left in his possession, and he was in fact allowed to deal with them as owner, and disposed of them, as a merchant, to his customers, from the date of the conveyance down to the time of the levy. Such a transaction the law always has, and I trust always will, pronounce a fraud upon creditors and purchasers."

In Southard v. Benner, 72 N. Y. 424, the court, in discussing the subject, say: "Where, at the time of the execution of a chattel mortgage upon a stock of merchandise, it is understood and agreed between the parties that the mortgagor may go on and sell the stock and use the proceeds, generally, in his business, and the agreement is carried out by permitted sales, the transaction is fraudulent in law as against the creditors of the mortgagor." And again in the same decision the learned court use the following language, which expresses the correct doctrine, as we think: "Such an agreement included in and making a part of the written instrument of mortgage would clearly invalidate it as fraudulent in law as that term is understood; that is, would be conclusive evidence of fraud in fact, and would be so held by the court as a matter of law. This was decided in Edgell v. Hart, 9 N. Y. 213. Whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference in principle. Its effect as characterizing the transaction would be the same. The difference in the modes of proving the agreement cannot take the sting out of the fact and render it harmless. If it is satisfactorily established, the result upon the security must be the same. It is the fact that such an agreement has been made and acted upon that in law condemns the security, and not the fact that it is proved by the instrument of security, instead of by parol or in some other way."

In Potts v. Hart, 99 N. Y. 168, 1 N. E. Rep. 605, the court use the following language: "A chattel mortgage is fraudulent and void as to creditors where it was given with the tacit or express understanding and arrangement that the mortgagee may sell and dispose of the mortgaged property, and apply the avails to his own use. Such an agreement may be inferred from the fact that the mortgagor does, with the knowledge and assent of the mortgagee, so sell and dispose of the property and apply the avails." In the same case the court, after discussing the proposition as to allowing the mortgagor to remain in possession, and sell and apply the proceeds to his own use, say: "The parties to a mortgage cannot thus play fast and loose with the mortgaged property, and thus hinder and delay creditors."

Chief Justice Ryan of Wisconsin, one of the ablest judges that court ever had, in the case of Blakeslee v. Rossman, 43 Wis. 124, in reviewing this same question, except that the mortgagor was allowed to retain one-half of the proceeds of the sale for his own use, and apply the other half to the payment of the mortgage debt, says: "But we prefer to rest our judgment on the ground first stated. The license given to the mortgagor to retain half the proceeds and use them at his pleasure makes the written contract of the parties fraudulent and void in law as against creditors; absolutely void as to them, beyond all aid from extrinsic facts. Parol evidence can make it neither better nor worse. Intent does not enter into the question. Fraud in fact goes to avoid an instrument otherwise valid. But intent, *bona fide* or *mala fide*, is immaterial to an instrument *per se* fraudulent and void in law. The fraud which the law imputes to it is conclusive. So a fraudulent agreement of parties by parol goes as fraud in fact to impeach a written instrument valid on its face. Fraud in fact imputed to a contract is a question of evidence, not fraud in law. And no agreement of the parties in parol can aid a written instrument fraudulent and void in law. Wood v. Lowry, 17 Wend. 492; Edgell v. Hart, 9 N. Y. 213; Robinson v. Elliott, 22 Wall. 513."

It was said by the Supreme Court of Ohio, as early as 1847, in the case of McElroy v. Myers, 16 Ohio, 547: "A mortgage upon a specific article, with possession and power of disposition left in the mortgagor, is, in truth, no mortgage at all. It is no certain lien. The power to hold possession and dispose of the property is inconsistent with the very nature of a mortgage. It, indeed, would not, perhaps, be going too far to say that such an instrument was a nullity. It is the next thing to a sale of a horse with possession and power of disposition retained to the vendor. Except in the case of a mortgage, it would be contended that a time might happen when the mortgagee could assert possession; but, before condition broken and possession taken, it would be hard to discover any difference. * * * As to all the world except as to the parties themselves, such a mortgage will be held void as against the policy of the law." It was further said in the case just cited that there was no specific lien, but a floating mortgage, which attaches, swells, and contracts, as the stock in trade changes, increases, and diminishes.

It was held by the Supreme Court of Kansas, in the case of Leser v. Glaser, 4 Pac. Rep. 1030, 32 Kan. 546, after quoting the following remarks by James O. Pierce in 17 Am. Law Rev. 350 *et seq.*: "All cases in which a power of sale of the goods by the mortgagor is provided for are, therefore, to be tested by the question whether such sales are to be made in his own behalf, and at his own discretion, and with the control of the proceeds reserved to him, or whether they are to be made solely in pursuance of the trust as a real one; that is, for the benefit of the grantee or mortgagee, and with provision that the proceeds shall be applied on his debt." The Supreme Court, following, say: "We think there is much reason for the distinction made by Mr. Pierce. The first class of mortgages mentioned by him ought generally to be held void, while the other class of mortgages ought generally to be held valid."

It was held by the Supreme Court of New Mexico, in the case of Speigelberg v. Hersch, 4 Pac. Rep. 705, 3 N. M. 185: "Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell their goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and, where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. * * * That this fraudulent transaction should be carried on under the forms of law is simply a scandal to an honorable profession. The law gives no sanction to such arrangements, and will hold them void as against creditors, as tending to encourage and sustain frauds, and to hinder creditors in the collection of their just demands."

In the case of Brasher v. Christophe, 10 Colo. 284, 15 Pac. Rep. 403, where the same question was under discussion, the court say: "Whatever the motives of the parties to such a transaction may be, viewed as a moral question in the business of everyday life, its effects are injurious, and in law and equity such agreements are fraudulent *per se* as against creditors and subsequent incumbrancers."

This question has had the careful consideration of the Supreme Court of the United States, in the case of Robinson v. Elliott, 22 Wall. 513, and it was held by the full bench, unanimously, that where a mortgagor was allowed to retain the possession of a stock of goods, with the power to sell and dispose of the mortgaged property and apply the proceeds to his own use, the mortgage was absolutely void. The opinion of the court was delivered by Justice Davis, and in commenting upon the question he uses the following language: "But the creditor must take care, in making his contract, that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract. These principles are not disputed, but the courts of the country are not agreed in their application to mortgages with somewhat analogous provisions to the one under consideration. The cases cannot be reconciled by any process of reasoning, or on any principle of law. As the question has never before been presented to this court, we are at liberty to adopt that rule on the subject which seems to us the safest and wisest. * * * Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did was to allow the mortgagors, under cover of the mortgage, to sell their goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and, where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. The views we have taken of this case harmonize with the English common-law doctrine, and are sustained by a number of American decisions."

The courts of Colorado, Illinois, Mississippi, Nevada, Oregon, Tennessee, Texas, Virginia, Washington, West Virginia, Ohio, Wisconsin, New York, New

Mexico, Minnesota, Missouri, Pennsylvania, Arkansas, the District of Columbia, and the United States Supreme Court, as well as others, have held that where a mortgagor is allowed to retain the possession of the mortgaged property, with an agreement to sell the same and apply the proceeds to his own use, it is absolutely void as against creditors. This doctrine we believe to be the sound reasoning of the subject, supported by the great weight of authority, and should be announced as the law of this court. Among the cases which hold to this doctrine are the following: Bank v. Goodrich, 3 Colo. 139; Wilcox v. Jackson, 7 Colo. 521, 4 Pac. Rep. 966; Brasher v. Christophe, 10 Colo. 284, 15 Pac. Rep. 403; Wilson v. Voight, 9 Colo. 614, 13 Pac. Rep. 726; Greenbaum v. Wheeler, 90 Ill. 296; Dunning v. Mead, *Id.* 376; Goodhart v. Johnson, 88 Ill. 58; Simmons v. Jenkins, 76 Ill. 479; Joseph v. Levi, 58 Miss. 843; Harmon v. Hoskins, 56 Miss. 142; *In re* Morrill, 2 Sawy. 356, Fed. Cas. No. 9,821; Jacobs v. Ervin, 9 Or. 52; Bremer v. Fleckenstein, *Id.* 266; Catlin v. Currier, 1 Sawy. 7 Fed. Cas. No. 2,518; Bank v. Haselton, 15 Lea, 216; McCrasly v. Hasslock, 4 Baxt. 1; Bank v. Ebbert, 9 Heisk. 153; Bank v. Lovenberg, 63 Tex. 506; Wray v. Davenport, 79 Va. 19; Perry v. Bank, 27 Grat. 755; Lang v. Lee, 3 Rand. (Va.) 410; Wineburgh v. Schaer, 2 Wash. T. 328, 5 Pac. Rep. 299; Fox v. Davidson, 1 Mackey, 102; Gauss v. Doyle, 46 Ark. 122; Gauss v. Orr, *Id.* 129; Lund v. Fletcher, 39 Ark. 325; Potts v. Hart, 99 N. Y. 168, 1 N. E. Rep. 605; Brackett v. Harvey, 91 N. Y. 214; Southard v. Benner, 72 N. Y. 424; Griswold v. Sheldon, 4 N. Y. 581; Collins v. Myers, 16 Ohio, 547; Blakeslee v. Rossman, 43 Wis. 116; Steinhart v. Duester, 23 Wis. 136; Place v. Langworthy, 13 Wis. 629; Leser v. Glaser, 4 Pac. Rep. 1030, 32 Kan. 546; Pierce, Mort.; Speigelberg v. Hersch, 4 Pac. Rep. 705, 3 N. M. 185; Robinson v. Elliott, 22 Wall. 512; Twyne's Case, 3 Coke, 80; 1 Smith, Lead. Cas. p. 1; Freeman v. Rawson, 5 Ohio St. 1; Harman v. Abbey, 7 Ohio St. 218; Ball v. Slafter, 26 Hun, 353; Putnam v. Osgood, 52 N. H. 148; Horton v. Williams, 21 Minn. 187; Walter v. Wimer, 24 Mo. 63; Stanley v. Bunce, 27 Mo. 269; White v. Graves, 68 Mo. 218; Welsh v. Bikey, 1 Pen. & W. 57; Hower v. Geesaman, 17 Serg. & R. 251; Williams v. Lord, 75 Va. 390; Mann v. Flower, 25 Minn. 500.

CONTRACTS — PUBLIC POLICY — LOANING COUNTY FUNDS—RECOVERY.—It is held by the Supreme Court of Indiana in Winchester Electric Light Co. v. Veal, that under Rev. St. Ind. 1894, designating as embezzlement the conversion to one's own use, or that of another, of public funds intrusted to him, where a county treasurer loaned county funds as his own, he cannot enforce the securities taken therefor. Howard, C. J., says:

It seems clear that under this statute the appellee, in loaning the money in his hands as county treasurer, was guilty of a felony. It is hence argued that, having thus engaged in the commission of an act made criminal by the law of the State, the appellee is not in position to invoke the same law to aid him in the recovery of the money loaned; that by assisting him to make good his loan the law would, in effect, be but abetting him in his wrongdoing,—in other words, that the law cannot help the criminal to reap the fruits of his crime, but must leave him where it finds him; and the county can look only to the treasurer personally and to his bondsmen to make good any loss that may be occasioned to the treasurer by the failure to recover the money so illegally loaned. It is admitted that the plea here made by the borrower is not one of honor, but rather of bare legal right. "We accept and adopt," say counsel for appellants, "the language of Judge Worden in Rock v. Stinger, 36 Ind. 346, where he says: 'We may remark, however, that the defense has nothing in it to commend itself to favorable consideration; but, notwithstanding this, it should prevail if the rigid law is with the defendant's.'" Counsel also quote from Holman v. Johnson, Cowp. 343, where it was said by Lord Mansfield: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. * * * No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of his country, there the court says he has no right to be assisted. It is upon that ground that the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." It is said by counsel for appellee that the ruling of the trial court in the case before us was based upon the theory that the legal title to the money loaned was in the treasurer, and that consequently he had the right to loan and collect the same; and that in making such ruling the court below was but following the decisions of this court. Counsel for appellants contend that these decisions were made before the enactment, in 1881, of the penal statute above set out, and that this court has not, since that date, held that the treasurer can loan the money in his hands, although it has held that the legal title to the money is still in the treasurer. Harvey v. State, 94 Ind. 159; Rogers v. State, 99 Ind. 218; Rowley v. Fair, 104 Ind. 189, 3 N. E. Rep. 860. It is to be noted, however, that these and other like decisions, though made since the enactment of the criminal statute in question, were not made with reference to that statute. Not until now, so far as we have been able to learn, has that statute been brought here for consideration; and now, for the first time, it becomes necessary to decide whether a contract made in violation of the statute is valid and enforceable between the parties. Moreover, even as to the treasurer's title to the money loaned, the holding in the case of Rowley v. Fair, *supra*, is to the effect that such title is rather technical than substantial, and is acknowledged only for the better security of the funds, and not for the use or benefit of the officer himself. In that case the court, speaking by Judge Niblack, said: "But the title of a township trustee to the money for which he is held accountable is only recognized to the extent that is necessary for the better presentation of the various funds which the money represents, and is in fact a legal title only in a technical and very limited sense. The equitable title to, and the beneficiary interest in, such money is in the township; and, in that view, the money for which the trustee is liable upon his bond really belongs to the township." It was accordingly held in that case that notes and other evidences of indebtedness which had been taken by a deceased township trustee for township moneys loaned by him were rightfully turned over to

his successor in office, and did not belong to his administrator. See, also, State v. Wilson, 113 Ind. 501, 15 N. E. Rep. 596. As to the suggestion that such loaning of the township funds by the former trustee was embezzlement, the court expressly refused to make any decision, saying: "That is a question not now in any manner before us, and concerning which we are not now called upon either to intimate or to decide anything." In the case now under consideration, the appellee having violated an express statute in loaning the money in his hands as county treasurer, and the question being before us for decision, the holding must be that he can maintain no action based upon his own illegal act. This has been the invariable decision of all courts. "There is, to my mind," said Chancellor Kent, in Griswold v. Waddington, 16 Johns. 438, at page 486, "something monstrous in the proposition that a court of law ought to carry into effect a contract founded upon a breach of law. It is encouraging disobedience, and giving disloyalty its unhallowed fruits. There is no such mischievous doctrine to be found in the books." See, further, Insurance Co. v. Forsyth, 2 Ind. 483; Siter v. Sheets, 7 Ind. 132; Daniels v. Barney, 22 Ind. 207; State v. Sims, 76 Ind. 328; Case v. Johnson, 91 Ind. 477; Railway Co. v. Buck, 116 Ind. 566, 19 N. E. Rep. 456; Leonard v. Poole, 114 N. Y. 371, 21 N. E. Rep. 701; Bowman v. Phillips (Kan. Sup.), 21 Pac. Rep. 230; 1 Pars. Cont. 458; Broom, Leg. Max. 738.

But counsel for appellee finally contend that in cases such as that before us public policy requires that, notwithstanding the violation of the statute, the contract based upon such violation should nevertheless not be declared void. Many authorities, also, including cases in this and other courts, are cited in support of such contention,—among them, 1 Story Eq. Jur. §§ 298-300; 1 Pom. Eq. Jur. § 403, and notes; Lester v. Bank, 3 Am. Rep. 211; Deming v. State, 23 Ind. 416; Scotten v. State, 51 Ind. 52; State v. Levi, 99 Ind. 77. In these cases, however, other interests than those of the parties to the contract were concerned; and it was to protect such other interests, and not for the benefit of those who had violated the law, that the contracts were enforced. In Lester v. Bank, *supra*, a Maryland case chiefly relied upon by counsel, the president of the bank had borrowed from its funds, contrary to a statute. Recovery under the contract was enforced, not to shield the officials who had violated the law, but for the protection of the stockholders, depositors, and other creditors of the bank. In the Indiana cases cited, county auditors, in making loans from the school fund, had violated provisions of the statute. Public policy required that these contracts should be enforced, not in favor of the auditors, but for the protection of the school fund. It would have defeated the very purpose of the law to have done otherwise. These cases are not analogous to the case at bar. Here the action was not brought in the name of the county, nor did the appellee pretend to sue in his capacity as county treasurer, even if such suit by him could in any case be maintained. Rev. St. 1894, § 7820 (Rev. St. 1881, § 5735); Vanarsdal v. State, 65 Ind. 176; Caldwell v. Board of Com'rs of Fayette Co., 80 Ind. 99. Neither is there anything in the record from which it can be known that the county was pursuing the funds belonging to its treasury, or seeking to recover them from the appellants. No public interest in the result of this action is therefore shown, nor any reason why public policy would be served by a recovery on the contract sued on, in favor of the appellee. We have no doubt that, if the county were shown to be interested in the recovery of the money here sued for, it might by the proper officers, have been admitted as a party plaintiff in the original action. In such case, much of what is said by counsel, as also the authorities cited, would be in point to show that, on grounds of public policy, a recovery ought to be had on the debt sued on in favor of thecounty. The faults, or even crimes, of public officials, ought not to be allowed to interfere with the right of the people, through their several municipal and political organizations, to recover the moneys raised from them by taxation, and wrongfully converted or misapplied by such officials. In whosesoever custody the money of the county is found, it may be reached for the benefit of the county. Vigo Tp. v. Board of Com'rs Knox Co., 111 Ind., at page 178, 12 N. E. Rep. 305. The judgment is reversed.

BANKS AND BANKING — DRAFTS—COLLECTION.—The Supreme Court of Wisconsin decides in Canterbury v. Bank of Sparta, 64 N. W. Rep. 311, that where a draft was sent to defendant bank for collection and defendant, at the request of the drawee, advanced the funds for payment thereof and mailed a draft to the payee stating that it was "in payment of the draft" sent to it for collection, defendant, on discovering the insolvency of said drawee, could not intercept the letter and destroy the draft so mailed. The court says:

It may be conceded that the vendor of negotiable paper has the right of stoppage *in transitu* to the same extent as the vendor of other species of personal property. Here the La Crosse bank discounted the plaintiff's draft on W. E. Coats & Co., and forwarded the same to the defendant for collection. The defendant was under no obligation to pay that draft, especially as the account of W. E. Coats & Co. at the defendant bank was then considerably overdrawn. Nevertheless, the defendant, on the request of the managing agent of W. E. Coats & Co., whose authority is not questioned, made its own draft on the Chicago bank for the amount, payable to the cashier of the La Crosse bank, and sent the same in a letter by mail to the cashier of the La Crosse bank "in payment of draft on W. E. Coats & Co.," and that letter, with the draft inclosed, reached La Crosse in the regular course of mail. Undoubtedly, the defendant, in making its draft on the Chicago bank, gave a corresponding credit to W. E. Coats & Co. on the faith of their solvency; but it did so voluntarily, and for their accommodation, and without being induced to do so by any fraud or mistake of fact. While the defendant retained the actual or constructive possession of that draft, it could undoubtedly withhold its application in payment of the draft on W. E. Coats & Co.; but if, by sending the draft by mail to La Crosse, it parted with such possession, and vested the title to the draft in the La Crosse bank, then, manifestly, it lost all rightful authority to take the same from the mail. In thus mailing and sending the draft the defendant acted as the agent of the La Crosse bank. Such mailing of the letter inclosing the draft was, in legal effect, a delivery of the draft to the La Crosse bank. 1 Rand. Com. Paper, § 218; 1 Daniel, Neg. Inst. § 67; Buell v. Chapin, 99 Mass. 594; Kirkman v. Bank, 2 Cold. 397; Mitchell v. Byrne, 6 Rich. Law, 171; Sichel v. Borch, 2 Hurl. & C. 956; Funk v. Lawson, 12 Ill. App. 229.

The mere fact that after the draft was so sent by mail the defendant ascertained that W. E. Coats & Co. had failed, and hence that it had injudiciously given them further credit to the amount of the draft, did not authorize the defendant to stop payment of the draft, or take it from the mail. The draft was not transmitted to W. E. Coats & Co., but was transmitted by them, through the defendant, to the bank at La Crosse. In support of the views expressed, see Bank v. Richardson, 101 Mass. 287; Bank v. Mitchell, 9 Metc. (Mass.) 297; Pratt v. Foote, 9 N. Y. 463; Whiting v. Bank, 77 N. Y. 363; Eaton v. Cook, 32 Vt. 58. The judgment of the circuit court is reversed, and the cause is remanded, with direction to enter judgment against the defendant for the amount of the verdict directed in favor of the plaintiff, with interest and costs.

RELEASE OF ONE DEFENDANT—EFFECT—PAROL EVIDENCE—FRAUD.—According to the Supreme Court of Colorado in Denver & R. G. R. Co. v. Sullivan, 41 Pac. Rep. 501, where two railroad companies are jointly and severally liable for injury to a person, a release by such person of his right of action against one of the companies releases the other, and that where a written instrument on its face shows that it is a release of a cause of action against a railroad company for injuries, parol evidence to show that it was given as a receipt for wages is inadmissible. It was also held error on the part of the lower court, under the facts in evidence, to submit to the jury the question of fraud in the procurement of the release. The court says:

It is manifest from the instructions under which the evidence was submitted to the jury, and the special findings, that the derailment of the car upon which appellee was standing at the time was occasioned by a defect in the track; and hence the negligence upon which the appellee bases his right of recovery against the appellant would also constitute a cause of action against his employer, the Union Pacific Railway Company, it being the duty of that company, as well as of the appellant, to see that the road over which it ran its cars was safe and in good repair. The same duty devolved upon it in this respect as though it owned the track. The rule upon this subject is thus stated in Stetler v. Railway Co., 46 Wis. 504, 1 N. W. Rep. 112: "As between itself and its employees, who were directed to use the road in the business of the defendant company, such employees have the right to treat the road as the company's road, and the company, as to its employees, was bound to see that such road, whilst so used for its benefit by such employees, was in such condition as not to unnecessarily endanger their lives or limbs." To the same effect are Railroad Co. v. Ross, 142 Ill. 9, 31 N. E. Rep. 412; Railroad Co. v. Kanouse, 39 Ill. 272; Railway Co. v. Peyton, 106 Ill. 534; Elmer v. Locke, 135 Mass. 575; Snow v. Railroad Co., 8 Allen, 441. It therefore follows that his cause of action was a joint one against both companies, or a several one against either. In other words, both companies were liable for the injury, and a release that would bar appellee's right of action against one would inure to the benefit of the other, and be equally available as a defense to the action. The court below adopted this view, and correctly held that if the release in question was binding as between the appellee and his employer, the Union Pacific Railway Company, it was also a discharge of appellant from all liability. The doctrine is thus announced in Cooley, Torts (2d Ed.) p. 160: "It is to be observed in respect to the point above considered, where the bar accrues in favor of some of the wrongdoers by reason of what has been received from or done in respect to one or more others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar as to all." Tompkins v. Railroad Co., 66 Cal. 163, 4 Pac. Rep. 1165; Seither v. Traction Co., 125 Pa. St. 397, 17 Atl. Rep. 338; Chapin v. Railroad Co., 18 Ill. App. 47; Brown v. City of Cambridge, 3 Allen, 474; Leddy v. Barney, 139 Mass. 394, 2 N. E. Rep. 107. In the latter case it is held that a release given to one who is not in fact liable operates as a release to all who may be liable. The court say: "The rule that a release of a cause of action to one of several persons liable operates as a release to all applies to a release given to one against whom a claim is made, although he may not be in fact liable. The validity and effect of a release of a cause of action do not depend upon the validity of the cause of action. If the claim is made against one and released, all who may be liable are discharged, whether the one released was liable or not." Therefore, the controlling question in this case is whether the validity of the release relied on was successfully assailed upon the ground that it was fraudulently procured. In so far as the evidence introduced on this issue tends to show that the release was given as a receipt for wages, merely, it was incompetent, since the writing, in plain and unambiguous language, states that the $108 was paid in full settlement of the claim against the Union Pacific Railway Company on account of the injuries complained of, and in consideration of such payment expressly releases the company from any action therefor; and oral testimony is inadmissible to contradict or vary its terms. The only testimony, therefore, that was admissible, was the alleged statement of Manchester that he had been advised by his attorney that the Union Pacific Railway Company was not liable, and, "according to the reports sent in by the trainmen, the accident was caused by a lip on the rail, consequently the Rio Grande was responsible for the condition of the track." Laying aside the testimony of Manchester, who testified that he made no such statement, and assuming that the testimony of appellee is uncontradicted, and that Manchester did so state to him, and that it was true that he had been so advised, we are at a loss to perceive wherein that statement constitutes in any sense a fraud. It was at most a statement of opinion as to the legal liabilty of the Union Pacific Railway Company, and there was nothing in the relation of Manchester towards him that would imply any undue influence, or that should induce him to accept what he may have said without question. "It has been more than once held that it is error to submit a question of fraud to the jury upon slight parol evidence to overturn a written instrument. The evidence of fraud must be clear, precise, and indubitable. Otherwise it should be withdrawn from the jury." Railroad Co. v. Shay, 82 Pa. St. 198; Stine v. Sherk, 1 Watts & S. 195; Dean v. Fuller, 40 Pa. St. 474. It appears from the uncontradicted evidence

that the appellee read the paper before signing, and was fully informed as to its terms. He was therefore advised as to its effect as a release of all liability on the part of the Union Pacific Railway Company,—a result that he never questioned until he learned that its legal effect was also to release appellant,—and it is apparent that he now questions its validity on account of a misconception of such legal effect, rather than because he was influenced to sign it by any representation as to the non-liability of the Union Pacific Railway Company. The evidence relied on to show fraud in its procurement was clearly insufficient, and the court below erred in submitting that question to the jury. For this error we are compelled to reverse the judgment.

CONSTRUCTION OF WRITINGS — RESTRICTION OF GENERAL TERMS BY PARTICULAR RECITALS.

§ 1. *General Rules of Construction—Repugnant Provisions.*—The office of the construction of written instruments of every kind is to ascertain the purpose and intent with which they were drafted. If different portions of the same writing seem to express a divergent intent and to be repugnant to each other the apparent meaning of each clause must be considered with reference to the general purpose and intent of the whole instrument, whether letter, memorandum, will, agreement or statute. And every part of it must be taken into consideration. As said in Cruise's Digest: "Words are not the principal things in a deed, but the intent and design of the parties; and, therefore, where there are any words in a deed, that appear repugnant to the other parts of it, and to the general intention of the parties they will be rejected."[1] A rule formerly obtained in construing conveyances, that "where there are conflicting declarations of the use in the same instrument, the first shall prevail, the maxim being 'the first deed and the last will,' but this has long since been repudiated by the authorities.[2]" The modern rule is to give effect to the whole and every part of the instrument whether it be a will or a deed, or other contract, to ascertain the general intention and permit it, if agreeable to law, whether expressed first or last to overrule the particular and to transpose words wherever it is necessary in order to carry the general intention, plainly manifested, into effect."[3] The Missouri court has thus expressed the same doctrine: "The whole context including recitals must be considered in endeavoring to collect the intention of the parties, although the immediate object of inquiry be the meaning of an isolated clause. It is upon these principles that a general sweeping clause in a deed, which is indefinite in its character will be restricted and limited to estates and things of the same nature and description as those previously mentioned."[4]

§ 2. *Conflict Between General Terms and Specific Provisions.*—One of the peculiarities of this subject, where each decision depends so largely upon the particular language construed, is that no rule can be laid down, which is not subject to numerous apparent exceptions. One rule, very generally recognized and applied, is that general language must be taken to be limited and controlled by particular expressions. Thus in Terrance v. McDougal,[5] the Supreme Court of Georgia (Lumkin, J.), said that "the rule of construction applicable to all writings, constitutions, statutes, contracts and charters, public or private and even to ordinary conversation, is this: that general and unlimited terms are restrained and limited by particular recitals when used in connection with them. Not that I would reject the general terms altogether, but I would restrict them to cases of the same kind as those expressly enumerated." Warren v. Merrifield,[6] decided by the Massachusetts court, is an apt illustration of this rule. That was a suit on a contract whereby the plaintiff, Warren, agreed to deliver to defendant Merrifield, certain timber at certain prices, and defendant agreed to give plaintiff a deed for certain land at a certain price per acre, and to give a four months' note for one-half of the balance on or before July 1, and on October 1, a four months' note for the other half of balance. The parties by interlineation subsequently altered the

[1] 4 Greenl. Cruise, 307, Tit. Deed, Ch. XX. § 25. Cited with approval in Gibson v. Bogy, 28 Mo. 478, and in Jamison v. Fopiano, 48 Mo. 194.

[2] Cruise, Dig. Tit. Deed, Ch. XII. § 26.

[3] Quoted with approval in Rutherford v. Tracy, 48 Mo. 325. See, also, 3 Washb. Real Prop. 343; Campbell v. Johnson, 44 Mo. 247; Brown v. Huger, 21 How. 306; Lodge v. Lee, 6 Cranch, 237; Keith v. Reynolds, 3 Greenl. 393; Jackson v. Barringer, 15 Johns. 471; Thomson v. Thomson, 115 Mo. 64; West v. Bretelle, 115 Mo. 653, 658; Grandy v. Casey, 93 Mo. 595; Ford v. Unity Church, 120 Mo. 498; Bent v. Alexander, 15 Mo. App. 181.

[4] Johnson County v. Wood, 84 Mo. 509.

[5] 12 Ga. 526.

[6] 8 Metc. (Mass.) 93.

contract so as to substitute for "one-half of balance" the words "all that is delivered on or before the 1st of July, next," so that defendant was to give plaintiff "a note for all that is delivered on or before the 1st of July next, payable at bank in four months," ignoring the proposed payment on account by the deed to the land. On the 1st of July, the timber delivered did not amount to the value of the land to be conveyed, and so there was no "balance." Defendant refused to give a note for all that had been delivered, and plaintiff brought his action. The court (Shaw, C. J.), disregarding the express undertaking of the amended contract "to give a note for all that is delivered on or before the 1st of July next," held that the "leading and primary purpose" of the contract "was an exchange of a quantity of timber at fixed prices for a tract of land at a fixed price, and the payment of the residue in cash notes on time. In the course of the opinion he says: "One good rule of construction" is "to read the whole instrument through, and applying it to the subject matter, to ascertain the leading scope and purpose of the parties in making the contract; and when there is difficulty in carrying out all the details, as contemplated by the particular clauses to construe all such particular clauses so as best to promote and accomplish the primary and leading purpose of the contract."[7]

This rule will not be carried so far, however as to ignore the general language, and in the leading case of Bell v. Bruen,[8] decided by the Federal Supreme Court we have an instance where the general language is held to properly control the more particular expressions. There the contract sued on was a guaranty contained in the following letter: "Messrs. Bell & Grant, London. Dear Sirs: Our mutual friend Mr. Wm. H. Thorn has informed me that he has a credit for £2,000 given by you in his favor, with Messrs. Archias & Co. to give facilities to his business at Marseilles. In expressing my obligations to you for the continuance of your friendship to this gentleman I take occasion to state that you may consider this, as well as any and every other credit you may open in his favor, as being under my guarantee. I am, dear sirs, your friend and servant, M. Bruen." Under this guaranty plaintiffs, Bell & Grant, assumed to give Thorn credits for considerable sums, not only with Messrs. Archias & Co. at Marseilles, but with other firms at Cadiz, Gibraltar and Smyrna, and directly to Thorn himself. Upon Thorn's becoming insolvent, plaintiffs brought suit against the guarantor, on bills of exchange, drawn upon these various credits. The court below directed a verdict for defendant, on the ground that the letter of guaranty, properly construed, only embraced credits opened for Thorn with the house of Archias & Co., Marseilles. The Supreme Court of the United States reverse this decision and held that the guaranty included "any and every other credit" defendants might open in Thorn's favor, whether with Archias & Co. or with any and every other person; that the case does not fall within the rule of construction of bonds, with conditions for the performance of duties preceded by recitals, viz: that where the undertaking is general it shall be restrained and limited within the recitals; that that rule of construction is not fairly applicable to mercantile documents such as letters of guaranty; but that such instruments should receive the construction which under all the circumstances of the case ascribes the most reasonable, probable and natural conduct to the parties; that "the general words not being restricted by the recital they fairly import that Matthias Bruen was bound to Bell and Grant for the credits the opened in favor of Wm. H. Thorn with Archias & Co; and for credits also they opened in favor of Thorn with and every other person; that to hold otherwise would be to reject altogether the general words "as well as any and every other credit" as unmeaning and useless.

§ 3. *Scope and Purpose of Recitals.*—Recitals may be resorted to for the purpose of explaining the subject-matter of the contract, and the general intentions, but not for the purpose of enlarging a specific undertaking within the scope of the general intentions or of the subject-matter.[9] Or, as said in Chitty on Contracts,[10] "where the words in the operative part of a deed or agreement are of doubtful meaning the recitals may be used as a test, to discover the intention of the par-

[7] Warren v. Merrifield, 8 Metc. 96.
[8] 1 How. 169, 180.
[9] Miller v. Wagenhauser, 18 App. 11. See, also, Covington v. McNickle, 18 B. Mon. 262; Torrance v. McDougal, 12 Ga. 256; Hare v. Horton, 5 B. & Ad. 715.
[10] (12th ed.) 1893, p. 139.

ties and to fix the true meaning of those words." Or, as stated by Patterson, J., in Walsh v. Trevanion,[11] "when the words in the operative part of a deed or conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed. On the other hand, when those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words." Again, said Jessel, M. R., in *Re* Mitchells' Trusts,[12] "another thing which I think we may consider settled by authority is, that where the words of a covenant are ambiguous and difficult to deal with, we may resort to the recitals to see whether they throw any light on its meaning." In a Missouri case a written instrument recites that certain property has been sold and that one Norman Cutter has a claim against it which he threatens to prosecute; and then provides that certain notes, a part of the consideration, and secured by deed of trust, shall be deposited in the hands of a stakeholder pending the settlement of said alleged claim, of said Cutter's to indemnify the purchasers against said claim "or any other claimant," it was held that the language "or any other claimant" was limited by the expressed purpose of the instrument as set out in the recitals and that the indemnity extended no farther than to Norman Cutter's claim.[13] In Doran v. Ross,[14] an English case where there was a marriage settlement so expressed that it was doubtful, whether in the event of the death of the wife without children, the whole estate did not go to her nephew—and it was a question of construction whether the word her should not be construed his, the Lord Chancellor refused parol evidence to explain the intention of the deed; and then said that if there was any recital to which the expression in the deed was contrary, he would consider which were the means to come at it; but that without some such guide he could not change the words of the settlement. That there was no authority on which he could do that."

§ 4. *Estoppel by Recital.*—Preliminary recitals in a written instrument are sometimes effective not by controlling the construction of the operative parts of the instrument, but by way of estoppel. Thus in an action of covenant on a deed which sets out, by way of recital, that plaintiff had invented certain improvements in the construction of looms, and had patented them, and had agreed with defendants to permit them to use such inventions for a part of the life of the patent, where plaintiff alleges that he covenanted to permit defendants to use such inventions and defendants, in consideration of the grant covenanted to perform the agreement on their part; and alleges a breach, non-performance, it was held that defendants were estopped to plead that the invention was not a new invention and that plaintiff was not the first or true inventor of said improvements.[15] So, where the suit was upon a bond, the condition of which recited that by lease, of even date therewith, certain premises were let to defendant for the yearly rental of £170 and the condition of the bond was stated to be the payment of the rental and the performance of the covenants of the lease, and it appears that the lease when set out, showed the rent reserved to be £140 it was held that defendant was estopped from pleading either (*a*) that there was no such lease as that mentioned in the condition, or (*b*) to set out the lease showing the rent to be £140 and to show that he has performed the contract by paying the rent there stipulated on the ground that that would be the same thing as saying that there was no such lease as stated in the bond.[16] In a Missouri case where both parties recited, in a deed conveying an unconfirmed claim to land, without warranty of title, that the grantors were the owners of the claim as the only surviving heirs and devisees of the original claimant, they are both estopped from denying the truth of such recital.[17] In Tyler v. Hall,[18] where the grantor in a deed recited his title as being "all my right, title and interest which I inherited from my father as one of three children and heirs at law. in and to" the land, he was held estopped to claim the land, when sued in ejectment by the grantee, under an unrecorded deed from

[11] 15 Ad. & E. 751.
[12] 9 Ch. Div. 9.
[13] Schulenburg v. Maguire, 42 Mo. 391.
[14] 3 Bro. Ch. 26.
[15] Bowman v. Taylor, 2 Ad. & E. 278.
[16] Lainson v. Tremere, 1 Ad. & E. 792.
[17] Clamorgan v. Greene, 32 Mo. 285. See, also, Dickson v. Anderson, 9 Mo. 156; Bailey v. Lincoln Academy, 12 Mo. 174; Joeckel v. Easton, 11 Mo. 124.
[18] 106 Mo. 313.

his father to himself for life, remainder to the heirs of his body, with a restriction upon the alienation of his interst therein.

§ 5. *Recitals in Releases.*—As to releases the rule is, that where there is a particular recital followed by general words of broader scope, the general words shall be qualified by the particular recital. As, where it is recited that various controversies subsist between the parties, and actions pending, and that it had been agreed that one should pay the other a certain sum of money, and that they should mutually release all actions or causes of actions, and thereupon such releases were executed, the releases though general in their terms will be held to be qualified by the recitals and limited to actions pending.[19]

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[19] Jackson v. Stackhouse, 1 Cow. 126. See, also, Lyman v. Clarke, 9 Mass. 235; Rich v. Ford, 18 Pick. 326; Allen v. Hatton, 20 Pick. 458; Chapin v. Clemitson, 1 Barb. 311.

COUNTIES — LIABILITY FOR TORTS OF EMPLOYEE.

HUGHES V. MONROE COUNTY.

Court of Appeals of New York, October 8th, 1895.

A county assuming the maintenance of an insane asylum through a board of trustees, not being engaged in the discharge of a public duty, is not liable for injuries sustained by one employed as a servant in the asylum through the negligence of a person in charge thereof.

BARTLETT, J.: The plaintiff appeals from an order made on a motion heard at the general term in the first instance, granting a new trial after verdict at the Monroe circuit in her favor. The plaintiff, an employee at the Monroe county insane asylum, was severely injured while operating a machine known as a "steam mangle," which was used in the laundry. At the trial it was insisted on behalf of the defendant that the county of Monroe was not liable, in any event; that, assuming its liability, the plaintiff had failed to make out a cause of action. As we are of opinion that the county of Monroe is not liable, under the facts as disclosed in this record, it is unnecessary to determine whether the plaintiff was entitled to go to the jury. The plaintiff was injured February 11, 1891. Before this action was commenced the county law of 1892 was in force; but it is unnecessary to examine its provisions, as the *status* of the county of Monroe on the 11th day of February, 1891, must determine its liability. Prior to the year 1863 the county of Monroe cared in part for its insane in a department of the county poorhouse. By chapter 82, Laws 1863, it was enacted that the insane asylum of the county of Monroe should be a separate and distinct institution from that of the Monroe county poorhouse, and the board of supervisors were placed in control, and authorized to elect a warden, who was to hold office for three years, and a board of three trustees for a like term. The warden was constituted the chief officer of the asylum, subject to the regulations established by the board of supervisors. All purchases for the asylum were to be made by the warden, under the direction of the trustees. All contracts with the attendants and assistants were to be made in the official names of the trustees. The warden was also required to make out and deliver to the trustees, annually, an inventory of all property belonging to the asylum. The warden was also authorized to make contracts for the support of insane persons of the county, and, by the direction of the board of supervisors or the trustees, to demand from the State lunatic asylum all persons who were chargeable to the county of Monroe, or to any town or city in the county. It was further provided that no insane person residing in the county of Monroe, and likely to become a county charge, should thereafter be admitted to the State lunatic asylum without the written consent of the trustees of the Monroe county asylum, or the chairman of the board of supervisors. By chapter 633, Laws 1870, it was made the duty of the trustees to determine all questions in relation to the indigent insane, as to whether their maintenance was properly a charge upon a specified town within the county of Monroe, or upon the city of Rochester, or upon the county of Monroe. The trustees were also empowered, when any lunatic, not indigent, was placed in the asylum, to charge his estate, or the person legally responsible for his maintenance, and to collect the same.

It will thus be observed that the county of Monroe, being legally chargeable, as one of the political divisions of the State with the care of its insane, saw fit in 1863, with the consent of the legislature, to undertake the discharge of that duty through the instrumentality of a county asylum. In other words, the county of Monroe from that time shared with the State the burden of caring for the insane, withdrew from the State lunatic asylum all indigent insane for whose maintenance it was liable, and secured legislation requiring all the pauper insane of the county to enter its own asylum. When an insane person is deprived of his liberty and the custody of his property, placed in close confinement, and separated from family and friends, it is an extreme exercise of the police power by the State, or some political division thereof, for the protection of society, and to promote the best interests of the unfortunate victim of mental alienation. It therefore follows that the county of Monroe, while acting under the statutes referred to, was engaged in the discharge of a most important public duty, and consequently not liable

to the plaintiff in damages by reason of her injuries. Dill. Mun. Corp. (4th Ed.), § 693; Add. Torts (Banks' Ed.), p. 1298, § 1526. In Maxmillian v. Mayor of New York, 62 N. Y. 160, this court laid down the rules of law that control this case. The plaintiff sought to recover damages for the death of her intestate, who was killed by an ambulance wagon which was driven by an employee of the commissioners of charities and corrections. It was held that when the city of New York, by legislative enactment, was required to elect or appoint an officer to perform a public duty, laid not upon it, but upon the officer, in which it had no private interest, and from which it derived no special advantage, such officer is not a servant or agent of the municipality for whose acts it is liable, even though the officer had in charge, and was negligently using corporate property. Judge Folger said (page 164): "There are two kinds of duties which are imposed upon municipal corporations: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual. The other is of that kind which arises or is implied from the use of political rights under the general law, under the exercise of which it is as a sovereign. The former power is private, and is used for private purposes. The latter is public, and is used for public purposes. Lloyd v. Mayor, 5 N. Y. 374. * * * But where the power is intrusted to it as one of the political divisions of the State, and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser nor for misuser by the public agents. Eastman v. Meredith, 36 N. H. 284." In the case at bar, it is true, we are not dealing with a municipal corporation, for in February, 1891, the county of Monroe was a political division of the State, and, at most, only a *quasi* corporation; but, nevertheless, the reasoning in the opinion just cited is applicable.

By the act of 1863 the county of Monroe, through its board of supervisors, was required by the legislature to elect a warden and trustees of its insane asylum to perform an important public duty, in which it had no private interest, and from which it derived no special advantage. The warden and trustees, when so elected, were in no legal sense the agents of the county of Monroe, but were public officers engaged in the discharge of duties which involved the exercise of the police power, and in which the general public were interested. While the county of Monroe, by its board of supervisors, was empowered to enact general rules and regulations for the government of the asylum, and to elect its warden and trustees, it had no power to interfere directly with the management of the institution, unless the warden so elected was guilty of misconduct, when he could be removed by the board of supervisors. The non-liability of counties, and also of municipal and other corporations having special charters, for the acts of their officers when engaged in the discharge of public duties, and to that extent exercising acts of sovereignty, is established by many cases. Ensign v. Board of Sup'rs, 25 Hun, 20; Alamango v. Board of Sup'rs, *Id.* 551; Ham v. Mayor, 70 N. Y. 459; Smith v. City of Rochester, 76 N. Y. 506; Benton v. Trustees of Boston City Hospital, 140 Mass. 13, 1 N. E. Rep. 836; Curran v. City of Boston, 151 Mass. 505, 24 N. E. Rep. 781.

The learned counsel for the plaintiff, evidently appreciating the force of the general rule to which we have adverted, sought to show that the case at bar was, by reason of special facts, not within its operation. It is insisted that the defendant, at the time of this accident, was not only caring for the pauper insane of Monroe county, but also for other patients, through contracts made for that purpose. There is no evidence that the county of Monroe was caring for insane patients not residing in the county, for a consideration; but, if such were the case, it would be without warrant of law, as we think a fair construction of section 7 of chapter 82 of the Laws of 1863 limits the contracts to be made "to any individual of said county" who wishes to contract as to the care of the insane of Monroe county. There can be no doubt that the committee of a lunatic, or any one legally liable to support him, should, in the first instance, be required to pay for his maintenance; and the income derived in this manner is in no sense a source of profit to the county, so that it would be deemed, in law, as conducting a private business. We may also consider in this connection the suggestion that, as the asylum received a small sum annually from the sale of surplus farm products, it was to be treated as engaged in a private enterprise resulting in profits. The revenue derived from both of the sources referred to is merely incidental, and tends, to some little extent, to lessen the public burden assumed by the county of Monroe. Curran v. City of Boston, 151 Mass. 505, 510, 24 N. E. Rep. 781; Alamango v. Board of Sup'rs, 25 Hun, 151-153; People v. Purdy, 126 N. Y. 679, 28 N. E. Rep. 249, and 58 Hun, 386.

We have considered the other suggestions of counsel for appellant, contained in his brief, and consulted the authorities to which he refers, but find nothing to take this case from the operation of the general rule. The order of the general term should be affirmed, and, under the stipulation of plaintiff, judgment absolute ordered for the defendant, dismissing the complaint on the merits, with costs to defendant in all the courts. All concur, except Haight, J., not sitting. Ordered accordingly.

NOTE.—The rule that counties are not liable for tort unless by express provision of statute or by necessary implication therefrom is well established. Dillon on Munic. Corp., § 963, 4 Amer. & Eng. Ency-

clopædia of Law, p. 364; Hill v. Boston, 122 Mass. 351; Askew v. Hale County, 54 Ala. 639. Certainly counties will not be held liable for neglect to perform an act when no duty to perform such act is imposed on them by statute. Covington County v. Kinney, 45 Ala. 176; Swineford v. Franklin County, 73 Mo. 279. The weight of authority is that whether a duty is imposed by statute or not the county is not liable for a neglect to perform it unless such liability is expressly imposed by statute. Governor v. Justice, 19 Ga. 97; Haygood v. Justice, 20 Ga. 845; Town v. Kemper, 55 Ill. 346; White v. County, 58 Ill. 297; Kincaid v. Hardin County, 53 Iowa, 430; Turner v. Woodbury County, 57 Iowa, 440; Marion County v. Riggs, 24 Kan. 255; Detroit v. Blakely, 21 Mich. 84; Sutton v. Board, 41 Miss. 236; Brabham v. Supervisors, 54 Miss. 363; Reardon v. St. Louis County, 36 Mo. 555; Woods v. Colfax County, 10 Neb. 552; Cooley v. Freeholders of Essex, 27 N. J. L. 415; State v. Hudson Co., 30 N. J. L. 137; Freeholders v. Strader, 18 N. J. L. 108; Livermore v. Freeholders, 29 N. J. L. 245; Pray v. Jersey City, 32 N. J. L. 394; Kinsey v. Magistrates of Jones, 8 Jones L. (N. C.) 186; White v. Chowan Co., 90 N. Car. 437, 47 Am. Rep. 534; Whitehead v. Phila., 2 Phila. (Pa.) 99; Young v. Commissioners, 2 Nott. & M. (S. Car.) 537; Wood v. Tipton Co., 7 Baxt. (Tenn.) 112; Nevasota v. Pearce, 46 Tex. 525. There are some cases that hold that where this duty is imposed by statute, the county will be liable for its neglect. Ferguson v. Davis Co., 57 Iowa, 601; Huff v. Poweshiek, 60 Iowa, 529; Eyler v. Alleghany Co., 49 Md. 257; Commissioners v. Gibson, 36 Md. 229; Shelby Co. v. Deprez, 87 Ind. 509; Morgan Co. v. Pritchett, 85 Ind. 68; House v. County Com'rs, 60 Ind. 580; Rigony v. Schuylkill Co., 103 Pa. St. 382. There is apparent conflict between some of the cases upon the question of the liability of counties in the erection, maintenance and repair of highways, bridges, etc., but this difference is rather apparent than real. An examination of the cases tends to show that, where this liability is held to attach, it is founded either upon express statute, from necessary implication therefrom or because the duty of skillful erection and repair has been considered to be imposed directly or by implication of the legislature. 4 Amer. & Eng. Encyclopædia of Law, p. 365. See Barbour County v. Horn, 48 Ala. 649; Covington County v. Kinney, 45 Ala. 176; Humphreys v. Armstrong, 3 Brews. (Pa.) 49; Rigony v. Schuylkill County, 103 Pa. 382, 68 Amer. Dec. 294, note; Armstrong v. Clarion County, 66 Pa. St. 218; Lyman v. Hampshire County, 140 Mass. 311; Mackey v. Murray, etc. Counties, 59 Ga. 832; Davis v. Home, 64 Ga. 69; House v. Montgomery County Com'rs, 60 Ind. 581; Pritchett v. Morgan County, 62 Ind. 210; State v. Com'rs, 80 Ind. 428; State v. Gibson County, 80 Ind. 478; Morgan County v. Pritchett, 85 Ind. 68; Vaught v. Johnson County, 101 Ind. 123; Allen County v. Bacon, 96 Ind. 31; Patton v. Montgomery County, 96 Ind. 131; Taylor v. Davis County, 40 Iowa, 295; Moreland v. Mitchell County, 40 Iowa, 394; Albee v. Floyd County, 46 Iowa, 177; Krause v. Davis County, 44 Iowa, 141; Ferguson v. Davis County, 57 Iowa, 601; Eyler v. Alleghany County, 49 Md. 257; State v. Titus, 47 N. J. L. 89; Hulner v. Union County, 7 Oreg. 83; White v. Chowan County, 90 N. C. 437; Clark v. Adair, 79 Mo. 536; Marion County v. Riggs, 24 Kan. 255; Hordenbeck v. Winnebago County, 95 Ill. 148. Judge Dillon upon the subject of the cases respecting the liability for defects in bridges and highways concludes as follows: "On examination, it will be found that the cases may be grouped into the following classes: I. Where neither chartered cities nor counties are held to an implied civil liability. Only a few States have adopted this extreme view. II. Where the reverse is held, and both chartered cities and counties are alike considered to be impliedly liable for their neglect of duty in question. This doctrine prevails in a small number of States. III. Where municipal corporations proper, such as chartered cities, are held to an implied civil liability for damages caused to travelers for defective and unsafe streets under their control, but denying that such liability attaches to counties or other *quasi* corporations, as respects highways and bridges under their charge. This distinction has received judicial sanction in a large majority of the States, where the legislature is silent in respect of corporate liability." Dillon on Mun. Corp. Sec. 999.

Late Cases on the Subject.—Plaintiff, the employee of an independent contractor, engaged in building a bridge on a county road, was injured by the negligent explosion of a charge of dynamite by the agents of defendant county while blasting and building an approach to the bridge. Held, in an action for damages, that counties are not liable for the torts of their officers acting within the line of their authority, unless made so by statute. Smith v. Board of County Com'rs Carlton County, 46 Fed. Rep. 340. In the absence of special statutory provisions a county is not liable to a laborer for personal injuries sustained by the negligence of the county's officer, under whom work was being performed. Smith v. Board Com'rs Allen County (Ind. Sup.), 30 N. E. Rep. 949. A county is not liable for personal injuries caused by the negligence of its board of commissioners in the care and control of public buildings. Board Com'rs Vigo County v. Dailey (Ind. Sup.), 31 N. E. Rep. 531. A county is not liable for injuries caused by its neglect to provide a railing around a veranda on the second floor of the court house, where no liability is imposed by statute. Shepherd v. Pulaski County (Ky.), 18 S. W. Rep. 15. A county is not liable, at common law, for injuries resulting from a defect in one of its highways or bridges. Templeton v. Linn County (Oreg.), 29 Pac. Rep. 795. A county is not liable for personal injuries occasioned by the negligence of county officers in the construction or repair of county bridges. Board Com'rs El Paso County v. Bish (Colo. Sup.), 33 Pac. Rep. 184. Laws 1889, ch. 7, which imposes a liability on counties for damages arising from failure to keep roads and bridges in repair, authorizes the bringing of an original suit for such damages in any court of original jurisdiction. Hollingsworth v. Saunders County (Neb.), 54 N. W. Rep. 79. Under Laws 1889, ch. 7, a person injured by the failure of a county board to keep a public bridge in repair has a right of action against the county. Hollingsworth v. Saunders County (Neb.), 54 N. W. Rep. 79. Act Dec. 29, 1888, on the subject of county bridges (Acts 1888, p. 39), is not applicable to any county bridge erected before the passage of the act, and under the prior law the counties were not liable for injuries on defective bridges. Bibb County v. Dorsey (Ga.), 15 S. E. Rep. 647. A county is not liable for injuries caused by the negligence of the person in charge of a lunatic asylum maintained by the county, since, in maintaining such asylum, the county is engaged in the performance of the duty imposed on each county to support and care for its insane. Hughes v. Monroe County (Sup.), 29 N. Y. S. 495. A county is not liable for injury to the health of one confined in the county jail while awaiting trial, caused by the defective condition of the jail. Webster v. Hillsdale County (Mich.), 58 N. W. Rep. 317. A county is not liable for personal injuries

caused by defects in the construction and repair of its free gravel roads. Cones v. Board of Com'rs Benton County (Ind. Sup.), 37 N. E. Rep. 272. A county is not liable for damages caused by the neglect of duty by its officers to repair a bridge on a public highway, unless such action is given by statute. Bailey v. Lawrence County (S. D.), 59 N. W. Rep. 519. The plaintiff permitted a force of hands engaged in working the county roads to occupy his barn, and while there they negligently caused it to burn. Held, that the county was not responsible for the loss. Field v. Albemarle County (Va.), 20 S. E. Rep. 954. A county is not liable for damages due to the negligence of its agents in constructing a drain across a highway. Packard v. Voltz (Iowa), 62 N. W. Rep. 757. Where a county contracts for the construction of a bridge without requiring a bond from the contractors, as required by Code § 671, the county is liable for injuries to a traveler occasioned by a defect in the bridge, of which it had due notice. Cook v. Dekalb County (Ga.), 22 S. E. Rep. 151. Laws 1892, ch. 686, §§ 2, 3 (County Law), declaring counties to be municipal corporations, does not change the rule that a county is not liable for negligence of the board of supervisors in failing to maintain bridges in a reasonably safe condition for public travel. Albrecht v. Queens County, 32 N. Y. S. 473, 84 Hun, 399. Rev. St. 1894, § 3282 (Rev. St. 1881, § 2892), providing that the board of commissioners of a county shall cause all bridges therein to be kept in repair, and that the township superintendent shall place a warning against fast driving at each end of any bridge whose chord is less than 25 feet, does not absolve a county from liability for injury caused by a defective bridge of the dimensions mentioned. Board Com'rs Jackson County v. Nichols (Ind. Sup.), 38 N. E. Rep. 526.

CORRESPONDENCE.

QUERY—PROOF OF ILLEGAL SALE OF INTOXICATING LIQUORS.

To the Editor of the Central Law Journal:

Here is a query for your JOURNAL. Suit on a licensed liquor dealer's bond for damages by reason of the dealer having sold liquor to relatrix's husband, who, while drunk, attempted a murder, was arrested, tried, and sentenced therefor to 7 years' imprisonment. On the trial of the damage suit to sustain the relatrix's case, proof was made that on Jan. 20, 1895 (Sunday), the dealer sold liquor to relatrix's husband, was indicted for such sale, pleaded guilty thereto and was fined; this indictment, plea of guilty by dealer and judgment were introduced as evidence. Court held this indictment, plea and judgment as dealer was not sufficient proof where dealer and his bondsmen were sued civilly for the identical act. It seems to me this plea of guilty and judgment ought to be conclusive of the fact of the unlawful sale of liquor. It was a solemn admission of the dealer. It stands on a different footing from the cases where a plea of not guilty was interposed and a finding of guilty and judgment, etc. What say you? D. H. C.

BOOK REVIEWS.

AMERICAN STATE REPORTS, VOL. 44.

This volume contains many interesting cases and valuable notes. The subject of place where crime is committed is discussed in a long note appended to the report of the case of Simpson v. State (Ga.). The case of Beard v. City of Hopkinsville (Ky.), has an exhaustive note on the subject of municipal indebtedness within the meaning of prohibitions against. The subject of proof of *res judicata* is discussed in a note to Fahey v. Esterley Machine Co. (N. Dak.), and an interesting note on the subject of contracts to marry follows the report of the case of Van Houten v. Morse (Mass.). There are also many important cases reported without notes. Published by Bancroft-Whitney Co., San Francisco.

AMERICAN DIGEST, 1895.

The most censorious critic would have little to complain of the manner in which this volume has been prepared. Our friends, the West Publishing Co., seem to have reached the summit of correct law digesting methods, as exhibited by their work each year. The present volume is in fact a digest of all the decisions of all the United States courts, the courts of last resort of all the States and Territories and the intermediate courts of New York State, Pennsylvania, Ohio, Illinois, Kansas, Missouri, Texas and Colorado, U. S. Court of Claims, Court of Appeal and Supreme Court of the District of Columbia, etc., as reported in the *National Reporter* system and elsewhere from Sept. 1, 1894, to Aug. 13, 1895. It also includes notes of English and Canadian cases, a list of the reports included, a table of the cases digested and a table of cases overruled, criticised, followed, distinguished, etc., during the year. References are also made to the State reports by an improved method of topical citation. The volume contains over twenty-seven hundred pages in double columns. In the style and arrangement of heads and sub-heads and the system of references as well as in the printing and binding the book is entirely satisfactory. Published by the West Publishing Co., St. Paul, Minn.

BOUTWELL ON THE CONSTITUTION.

This volume sets forth in a plain, concise and easily comprehended form, the substance of the leading decisions of the Supreme Court in which the several articles, sections, clauses and even phrases of the constitution have been examined, explained and interpreted. To this he has given the pertinent and comprehensive title of "The Constitution of the United States at the end of the First Century." It is a work of great interest, not only because of the reputation of the writer as a lawyer and statesman, but also because it is a unique and valuable contribution to the constitutional history of the United States. It gives us the constitution as it was framed, tracing its principles to their sources, the constitution as it has been amended and the constitution as it is interpreted, settled and determined by the Supreme Court. It is a neat cloth volume of four hundred pages. Published by D. C. Heath & Co., Boston, Mass.

BOOKS RECEIVED.

Negligence of Imposed Duties, Carriers of Freight. By Charles A. Ray, LL. D. (Ex-Chief Justice of Indiana Supreme Court.) Author of Negligence of Imposed Duties, Personal, and Carriers of Passengers and Contractual Limitations. Rochester, N. Y. The Lawyers' Co-operative Publishing Company. 1895.

Introduction to American Law. Designed as a First Book for Students. By Timothy Walker, LL. D., Late Professor of Law in the Cincinnati College. Tenth Edition. Revised by Clement Bates of the Cincinnati Bar. Boston. Little-Brown & Company. 1895.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCOUNTING BY PARTNERSHIP.—A complaint in an action for a partnership accounting, alleging the non-payment to the plaintiff of $1,000 which it was agreed the firm should pay him, profits made by defendants by devoting, in violation of their agreement, a large part of their time to other business, and the consequent loss to the firm, money and property advanced by plaintiff personally for use of the firm for which he has not been reimbursed, states a single cause of action.—BREMNER v. LEAVITT, Cal., 41 Pac. Rep. 859.

2. ACCOUNT — Limitations.—Within Code Civ. Proc. § 344, declaring that in an action to recover a balance due on a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall accrue from the time of the last item, there is not a mutual account where defendant's testator owed plaintiff for services, and testator had intrusted to plaintiff money to be expended for testator at his direction, some of which was still in plaintiff's hands at testator's death, as plaintiff could not apply it on testator's debt to him, and plaintiff was not indebted on account thereof, but merely held it in trust.—MILLETT v. BRADBURY, Cal., 41 Pac. Rep. 865.

3. ADMINISTRATOR — Debts against Estate.—Where, pending an action for libel, the defendant therein died intestate, the claim of the plaintiff, even if meritorious, was not such a "debt" against the estate of the decedent as would prevent his widow, as sole heir at law, from taking possession of his estate without administration.—MCELHANEY v. CRAWFORD, Ga., 22 S. E. Rep. 895.

4. ADVERSE POSSESSION—Tenant in Common.—Where land is devised for life with remainder to certain persons, and the life tenant deeds the land in fee to a third person, one claiming as heir of such third person, under such deed, may acquire title by adverse possession against the remainder men, though himself entitled to claim an interest in common as a remainder-man.—MOLE v. FOLK, S. Car., 22 S. E. Rep. 882.

5. APPEAL—Notice.—Hill's Ann. Laws, § 537, provides that notice of appeal shall be served on the adverse party: Held, in an action on a bond against a principal and his sureties wherein the sureties had judgment and the principal defaulted, that the principal was an adverse party, within the meaning of said section.—JACKSON COUNTY v. BLOOMER, Oreg., 41 Pac. Rep. 930.

6. ASSIGNMENT—Set-off against Assignee.—A private banker closed his bank, and after six days made a voluntary assignment. Plaintiff, whose note to the assignor became due prior to the assignment, between the day of closing and the day of assignment purchased certificates of deposit issued by the assignor: Held, that under Rev. St. § 4258, authorizing one sued on a note by an assignee after maturity to set off against the same a contract demand against the assignor which he holds as assignee, in good faith, before notice of assignment, if the demand be such as might have been set off against the assignor while the note belonged to him, the certificate should be a set-off against his note.—JOHNSTON v. HUMPHREY, Wis., 64 N. W. Rep. 817.

7. ASSIGNMENT FOR CREDITORS—Validity.—A conveyance reciting that it is an assignment of the grantor's stock in trade and "property in general" for the benefit of his creditors, without any inventory other than a list, in the body of the instrument, of accounts, judgments, notes due, a storehouse, and a stock of goods subject to a special mortgage, with a list of creditors at the end, to which is attached an affidavit that the foregoing inventory is true, is void as a general assignment under Acts 1881, ch. 121, requiring an assignment for the benefit of creditors to be of all the debtor's property, and be accompanied by a verified inventory.—BANK OF COOKVILLE v. BRIER, Tenn., 32 S. W. Rep. 205.

8. ASSUMPSIT — Evidence.—In an action for the price of staves, the defense being that they were not of the "good and merchantable quality" that they were represented to be, plaintiff may testify that at defendant's request he shipped defendant a certain kind of staves, as part of an order, and "that defendant got them much cheaper than the others."—ANNISTON LIME & COAL CO. v. LEWIS, Ala., 18 South. Rep. 326.

9. ATTACHMENT—Unrecorded Deed.—It is the settled law of this State that an attachment of all the right, title, and interest which the debtor has in lands is a good attachment of the land itself; and a seizure and sale on execution, pursuant to the attachment, of such right, title, and interest, will pass to the creditor a good title to the land as against a prior unrecorded deed of the debtor.—PARKER v. PRESCOTT, Me., 32 Atl. Rep. 1001.

10. BANKS — Insolvent Bank—Action to Recover Deposit.—One who at various times deposited moneys with a bank, not knowing of its insolvency, and from time to time drew checks on the amount, cannot, after the bank has been declared insolvent, recover from the receiver the amount remaining to his credit, as the fund was not impressed with a special trust in his favor, and could not be identified and traced into the hands of the receiver.—BLAKE v. STATE SAV. BANK, Wash., 41 Pac. Rep. 909.

11. BANKS AND BANKING—Negotiable Instruments.—Where a person, at the solicitation of national bank officers, gave his note to the bank to take up the note of a stranger, for the purpose, as stated by the officers, of getting the old note "out of the past due notes," held, that the maker of the new note was liable to the receiver of the bank, on a renewal of the note, whether the transaction was a real one, or a mere trick to make it appear to the government and the creditors and stockholders that the bank had a valuable asset which it in fact did not have.—PAULY v. O'BRIEN, U. S. C. C. (Cal.), 69 Fed. Rep. 460.

12. BOND — Consideration.—Complainants employed a contractor to build a house, and after a partial payment, discovered that the balance due was insufficient to satisfy liens. Complainants then paid to said contractor a sum equal to the claim of one of the subcontractors, which was immediately paid over to said subcontractor; and the latter, pursuant to agreement, executed a bond to complainants to hold them harmless for any excess they should be compelled to pay, over the amount remaining in their hands, to another subcontractor: Held, that said bond was without consideration.—HANKS v. BARRON, Tenn., 32 S. W. Rep. 195.

13. BUILDING AND LOAN ASSOCIATION—Certificates of Stock.—A loan association whose secretary customa-

rily issues, in lieu of certificates, statements under the corporate seal and attested by him, that persons therein named appear as stockholders on its books, is bound by such a statement upon the faith of which a loan is made by the one to whom it is issued, although the issuance of such statements be not authorized by the company's charter or by-laws, where they are customarily recognized by it in the usual course of business. — RICHARDSON V. DELAWARE LOAN ASS'N, Dela., 32 Atl. Rep. 980.

14. CARRIERS—Assault on Passenger.—The contract of a common carrier with a passenger requires the carrier to protect the passenger against interference or injury arising from the negligence or willful misconduct of its servants while engaged in performing the duties which the carrier owes to the passenger; and, where a passenger upon a railroad train is unjustifiably assaulted and beaten by an employee who owed him the duty of protection, the railroad company is responsible for his acts and liable for the injury suffered.—ATCHISON, T. & S. F. R. CO. V. HENRY, Kan., 41 Pac. Rep. 952.

15. CHATTEL MORTGAGE—Failure to Record.—Where a lessor leased a farm for one half of the grain to be grown thereon, and after the crop was sown, but before matured, the lessor assigned the rent contract as collateral security for the payment of a note, such assignment is a mortgage, and must be recorded, to be valid against creditors of the lessor.—WOODWARD V. CRUMP, Tenn., 32 S. W. Rep. 195.

16. CONDITIONAL SALE OF LAND—Vendor and Vendee. —A contract for the sale of land providing that, if the vendee failed to pay the price or the interest thereon within a time specified, the vendor could rescind the contract, and that all improvements and payments made by the vendee should thereupon be forfeited, is a contract of conditional sale, and, in the absence of fraud, cannot be construed as an equitable mortgage, so as to relieve the vendee from forfeiture on rescission by the vendor for default in payment of interest. —PEASE V. BAXTER, Wash., 41 Pac. Rep. 899.

17. CONSTITUTIONAL LAW—Arrest without Warrant.— The statute conferring authority upon the police officers of a city of the first class to make an arrest (Gen. St. 1889, par. 623), so far as it attempts to authorize an arrest without a warrant for misdemeanors not committed in the view of the officer, and merely upon suspicion, is unconstitutional and void.—IN RE KELLAM, Kan., 41 Pac. Rep. 960.

18. CONTRACT TO CONVEY LAND.—A conveyance of land to a third person by one bound by an executory contract to convey it to another at a future date is not a breach of such contract, and does not entitle such other to treat the contract as abandoned before the time of performance arrives.—GARBERINO V. ROBERTS, Cal., 41 Pac. Rep. 857.

19. CONTRACTS OF CITY.—Gas Companies, under Civ. Code, § 629, are required under penalty, to furnish gas upon demand. The city charter of Sacramento (section 211), provides that no officer of the city shall be interested in the sale of any article to the city, and declares that such sales shall be void: Held, that a city whose mayor was president of the gas company was liable for the value of gas supplied under an implied contract.—CAPITAL GAS CO. V. YOUNG, Cal., 41 Pac. Rep. 869.

20. CONTEMPT.—Proceedings in contempt are criminal in their nature, and the rules of strict construction applicable to criminal proceedings are to govern therein.—O'CHANDER V. STATE, Neb., 64 N. W. Rep. 373.

21. CONSTITUTIONAL LAW—Title of Act.—The object of section 11, art. 3, of the constitution, providing that no bill shall contain more than one subject, and the same shall be clearly expressed in its title, is to prevent surreptitious legislation. If a bill has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate this provision of the constitution.—VAN HORN V. STATE, Neb., 64 N. W. Rep. 365.

22. CONTEMPT—Affidavit—Evidence.—In a proceeding to punish for an alleged contempt, not committed in the presence of the court, the affidavit upon which the proceeding is based is jurisdictional, and it must affirmatively disclose sufficient facts to show that the case is one over which the court has jurisdiction.— HAWTHORNE V. STATE, Neb., 64 N. W. Rep. 359.

23. CONTRACT WITH WIFE—Validity.—An agreement whereby a husband promised to pay his wife a specified sum per year for keeping house is contrary to public policy, and without consideration.—MICHIGAN TRUST CO. V. CHAPIN, Mich., 64 N. W. Rep. 334.

24. CONVERSION — Sale of Pledged Stock.—Where a pledgee is authorized to have pledged certificates of bank stock transferred on the bank's books, and the pledgee, on default of the piedgor, without personal notice to him, puts up the stock for sale at public auction, and bids it in, the bank issuing it will not be liable for conversion of the stock if it transfers it on its books to the purchaser, though notified by the owner not to do so, for fraud in the sale.—FIRST NAT. BANK OF GATESVILLE V. MINGS, Tex., 32 S. W. Rep. 178.

25. CONTRACT—Rescission.—In his bill to rescind, on the ground of fraud, a contract for the sale of land which defendant had paid for in stock, complainant alleged that the stock had no value, and offered to return the same, except "a few shares" which he had disposed of before he discovered the worthlessness of the stock. It also appeared from the bill that complainant offered to return only about two thirds of what he received, and more than one-half of that tendered was different from that received. The facts respecting the disposition of the "few shares" were not set up, nor was it alleged that complainant disposed of the stock, other than the few shares, before he discovered the fraud, and complainant admitted that he had received dividends on the stock: Held, that the bill was properly dismissed.—HILL V. HARRIMAN, Tenn., 32 S. W. Rep. 202.

26. CORPORATIONS—Action on Subscription.—It is no defense to an action by an assignee to recover the unpaid balance on a subscription to stock that no call had been made by the directors prior to the assignment, where the assets of the corporation, including unpaid subscriptions, were insufficient to meet its liabilities.—MACKAY V. ELWOOD, Wash., 41 Pac. Rep. 919.

27. CORPORATIONS — Contracts.—It is not *ultra vires* for a corporation to enter into a contract with an individual to engage in a certain venture, profits and losses to be divided equally among them, where all the management of the enterprise is intrusted to the corporation.—BATES V. CORONADO BEACH CO., Cal., 41 Pac. Rep. 855.

28. CORPORATIONS—Limit of Mortgage Indebtedness. —The Iowa statute provides that corporations organized thereunder must, by their articles of incorporation, fix a maximum of indebtedness, which shall not exceed two-thirds of their capital stock; this provision not to apply, however, where corporate bonds are issued and secured "by an actual transfer of real estate securities," which shall be a first lien on unincumbered real estate, worth at least twice the amount loaned thereon. McClain's Code, § 1611: Held, that the execution and delivery by the corporation of a mortgage on its own real estate to secure bonds was a transfer of real estate securities, within the meaning of the statute.—FIRST NAT. BANK OF MONTPELIER V. SIOUX CITY TERMINAL RAILROAD & WAREHOUSE CO., U. S. C. C. (Iowa), 69 Fed. Rep. 441.

29. CRIMINAL LAW—Life Sentence on Third Conviction.—Under Code 1887, §§ 3905, 3906, providing for sentencing for life a convict who has been previously twice sentenced to the penitentiary, one cannot be so sentenced unless it appears that the previous offenses were made felonies in themselves, and not made so in

the particular case because of prior convictions.—STOVER v. COMMONWEALTH, Va., 22 S. E. Rep. 874.

30. CRIMINAL LAW — Bringing Stolen Property into State.—Code, 1887, § 3890, providing for the punishment of certain offenses within the State when committed without the State, has no application to one bringing property stolen without the State into the State.—STROUTHER v. COMMONWEALTH, Va., 22 S. E. Rep. 852.

31. CRIMINAL LAW—Homicide—Insanity as Defense.—Where insanity or lunacy has not originated since the offense charged is alleged to have been committed, there is no requirement that the existence of such lunacy or insanity should be determined by a jury impaneled to determine whether or not the accused is of sound mind.—WALKER v. STATE, Neb., 64 N. W. Rep. 357.

32. CRIMINAL LAW — Rape. — While, in a prosecution for rape, or an assault with intent to commit rape, the State may only inquire of the prosecutrix whether she made complaint of the injury, and when, and to whom, but not as to the particular facts which she stated, still the defense, in cross examination, may inquire as to such particular facts.—WOOD v. STATE, Neb., 64 N. W. Rep. 355.

33. CRIMINAL LAW—Forgery.—How. Ann. St. §§ 9213, 9214, provide that every person who shall make or utter and publish any forged record, deed, etc., shall be punished: Held, that a chattel mortgage is a deed, within the meaning of said sections.—PEOPLE v. WATKINS, Mich., 64 N. W. Rep. 324.

34. CRIMINAL LAW—Recognizance—Release of Sureties.—The sureties on the recognizance of a person charged with crime are not discharged by a continuance of the case at the term at which the principal was required to appear.—PEOPLE v. HANAW, Mich., 64 N. W. Rep. 328.

35. CRIMINAL LAW—Larceny—Description of Owner.—Where cattle belonging to Mrs. N are stolen, and before the filing of the information she marries and becomes Mrs. A, an information charging the larceny of the cattle of Mrs. N is not objectionable in form on account of her change of name, and where her name is indorsed on the information as Mrs. N, she may properly testify as a witness without any new or different indorsement.—STATE v. LABERTEW, Kan., 41 Pac. Rep. 945.

36. CRIMINAL LAW—Rape.—Proof of actual penetration is necessary to support a conviction for rape. "Actual contact of the sexual organs" alone is insufficient. And in this case the jury ought also to have been instructed as to the law of an attempt to commit the crime of rape.—STATE v. GRUBB, Kan., 41 Pac. Rep. 951.

37. CRIMINAL LAW — Larceny—Indictment. — When property is stolen in one county, and taken by the thief into another, he may be charged in the latter county with the larceny therein, without stating the place of the original taking.—STATE v. WADE, Kan., 41 Pac. Rep. 951.

38. CRIMINAL TRESPASS—Indictment.—In a prosecution for a criminal trespass, under paragraph 2 of section 4440 of the Code, it is necessary that the value of the articles taken and carried away should be averred in the indictment, and also that the same should be proved on the trial. — GILREATH v. STATE, Ga., 22 S. E. Rep. 907.

39. DEED—Cancellation—Fraud.—Where a wife, while living in secret adultery, secured a conveyance from her husband to herself, through deception, equity will, upon petition, set it aside.—BYRD v. BYRD, Tenn., 32 S. W. Rep. 198.

40. DEED—Boundaries.—In construing a conveyance of real estate containing repugnant calls, for the purpose of determining the location of the land granted, the descriptive courses will be varied to make them conform to the monuments fixed by the terms of the conveyance as boundary or locative calls.—ABBEY v. MCPHERSON, Kan., 41 Pac. Rep. 978.

41. DEED AS EVIDENCE.—Under Code 1886, § 1798, providing that a conveyance duly acknowledged and recorded within 12 months shall be admissible without further proof, a deed not recorded within a year of its execution is not admissible to prove ownership, or color of title, without evidence of possession and claim of title under the deed. One is not bound by the declarations of another until it is shown that the latter was his agent. — POSTAL TELEGRAPH CABLE CO. v. BRANTLEY, Ala., 18 South. Rep. 321.

42. DOWER — Release — Rights to Purchaser. — A widow's release of her right of dower, except to a party in possession or in privity of the estate, before it is assigned to her, is without effect.—FIELD v. LANG, Me., 32 Atl. Rep. 1004.

43. ELECTION OF REMEDIES— Waiver of Tort.—One induced by fraud to sell her interest in an estate for less than its actual value cannot, in the same action, affirm the contract, and, waiving the tort, recover in *assumpsit*, on an implied promise, the difference between the amount received and its actual value.—BEDIER v. FULLER, Mich., 64 N. W. Rep. 331.

44. EQUITY—Marshaling Assets.—The facts alleged in the plaintiff's petition to marshal the assets of the estate of his intestate showed sufficient doubt and uncertainty as to the legal priority of the several claims against the estate, and enough complication in its affairs, to make the filing of the petition proper. This being so, it was not without equity, and it was error to dismiss it upon demurrer.—DANIEL v. COLUMBUS FERTILIZER CO., Ga., 22 S. E. Rep. 904.

45. ESTOPPEL—Adverse Possession.—On an issue as to whether a strip of land was a public alley, proof that, before plaintiff purchased the land, he went to inspect the city's map, but it was out of place, and that he found a map in possession of a person who copied it from a copy of the original, and that the strip in controversy was marked as other lots were, will not preclude the city from claiming that the strip was an alley.—CROCKER v. COLLINS, S. Car., 22 S. E. Rep. 885.

46. ESTOPPEL—Acquiescence.—One left in charge of a stock of goods, who knew of a sale by the owner, and surrendered possession to the purchaser without objection, is estopped to claim an interest in the goods under a partnership agreement with the owner which was unknown to the purchaser.—PATTON v. BARNETT, Wash., 41 Pac. Rep. 901.

47. ESTOPPEL BY RECORD—Ejectment.—One claiming under a grant by a certain name is conclusively bound by a judicial determination and definition of what land was meant by that name.—SCOTT v. RHODES, Cal., 41 Pac. Rep. 878.

48. ESTOPPEL BY DECLARATIONS— Homestead.—Declarations by persons who have commenced building on land, that it is not, and they do not intend to occupy it as, a homestead, will estop them from claiming it as a homestead against one who has been induced by such declarations to lend them money on security of the land.—HARMSEN v. WESCHE, Tex., 32 S. W. Rep. 192.

49. EVIDENCE—Declarations of Husband as to Wife's Property.—The declarations of a husband adversely to the interests of his wife in her separate property are not admissible against her heirs in an action to recover said property.—OWENS v. NEW YORK & T. LAND CO., Tex., 32 S. W. Rep. 189.

50. EXECUTION—Sale of Mortgaged Chattels.—Plaintiff purchased at execution sale property on which a chattel mortgage existed, the deputy sheriff who made the sale and the mortgagee agreeing that the mortgage, a decree of foreclosure of which had been rendered, should be first satisfied with the money paid by plaintiff. The deputy paid over the money to the clerk, and made return that the property was sold subject to the mortgage: Held, that plaintiff purchased the property subject to the mortgage, and that, as the deputy had no power to bind the sheriff by such an agreement, no action would lie to enjoin the sale there-

of under the mortgage.—HAMILTON v. CARTER, Wash., 41 Pac. Rep. 911.

51. FEDERAL COURTS—Circuit Court—Jurisdiction.—Where a plaintiff sues in good faith for the contract price of goods sold and delivered, amounting to over $2,000, and obtains a verdict for less than that sum because the defendant proves a set off, of the exact amount of which the plaintiff had no notice before the trial, the court is not deprived of jurisdiction, although plaintiff's counsel admits after the evidence is all in, that the recovery must be for less than $2,000.—WHEELER BLISS MANUF'G CO. v. PICKHAM, U. S. C. C. (Ill.), 69 Fed. Rep. 419.

52. FEDERAL COURTS — Jurisdictional Amount. — Where a court has jurisdiction for the recovery of money or damages when the amount "claimed" does not exceed a specified sum, and an action is brought for a less amount than such specified sum, the court is not ousted of jurisdiction by the filing of a counterclaim for a sum exceeding the aggregate amount of such jurisdictional amount and the sum claimed by plaintiff.—BENNETT v. FORREST, U. S. D. C. (Alaska), 69 Fed. Rep. 421.

53. FEDERAL AND STATE COURTS—Execution on Receivership Property.—A petition to a federal court for leave to levy an execution issued from a State court on property in the hands of a federal receiver, on the ground that the property was attached on process from the State court before it came into the receiver's hands, will not be determined, except on notice to the parties to the suit in the federal court, and notice to the receiver does not operate as notice to them.—IN RE HALL & STILLSON CO., U. S. C. C. (Cal.), 69 Fed. Rep. 425.

54. FEDERAL COURTS — Interest on Judgments. — Since in Nevada, under Gen. St. § 4903, providing that when no different rate of interest is specified, interest shall be allowed on a judgment at a certain rate, it is held that, when the judgment is silent as to interest, no execution calling for payment of interest is authorized, and Rev. St. U. S. § 966, provides that interest shall be allowed on judgments rendered in federal courts only when allowed on judgments by the laws of the State in which the court was held, an execution is sued on a judgment rendered in a federal court held in Nevada, which includes interest on the judgment, should be quashed.—MORAN v. HAGERMAN, U. S. C. C. (Nev.), 69 Fed. Rep. 427.

55. FEDERAL COURTS—Corporations— Unpaid Stock.—The right of creditors to look to unpaid portions of the capital stock as a fund for the payment of their claims is not created by State statutes, but is derived from general principles of law. The enforcement of such rights therefore, is not dependent upon remedies provided by State legislation; and if it appear that the State has, by statute provided legal remedies for the enforcement of equitable rights, the creditor may at his election, when proceeding in a federal court, adopt the form of remedy appropriate in courts of equity, or may sue at law, under the statute.—FIRST NAT. BANK OF SIOUX CITY v. PEAVEY, U. S. C. C. (Iowa), 69 Fed. Rep. 455.

56. FRAUDULENT CONVEYANCE — Consideration. — Where a partner, before the firm made an assignment, conveyed land to a creditor to secure his claim, and both parties acted in good faith, other creditors of the firm have no right to have such conveyance set aside as in fraud of their claims, where the receiver of such firm, by paying the amount of the secured claim, was entitled to have a reconveyance of the property.—MICHIGAN TRUST CO. v. BENNETT, Mich., 64 N. W. Rep. 330.

57. FRAUDULENT CONVEYANCES — Homestead. — To give a court in which a homestead deed, claiming goods as exempt, is attacked as in fraud of creditors, jurisdiction over the goods, there must be a valid attachment thereof, and, the attachment being dismissed, the suit should also be dismissed.—SIMON v. ELLISON, Va., 22 S. E. Rep. 860.

58. CHATTEL MORTGAGE — Subrogation. — A chattel mortgage in trust recited that the mortgagor, being indebted on certain notes, some of which were indorsed by a certain person as surety, executed the mortgage to secure "payment of said debts" and the surety "against liability on said indorsements," and authorized the trustee, on default in any of the debts, or if the surety was obliged to pay the indorsed note, to foreclose and sell sufficient of the property "to satisfy the debts and indorsements hereby secured:" Held, that the mortgage created a personal indemnity as to the surety, and not a fund to pay the notes on which he was liable.—UNION NAT. BANK v. RASCH, Mich., 64 N. W. Rep. 339.

59. HUSBAND AND WIFE—Incumbrances.—The joinder of a wife in a mortgage by her husband, of land conveyed to him by a deed expressly reserving in favor of the wife a lien for advances by her to the grantor, will not estop her from afterwards asserting the priority of her lien over that of the mortgagee, though the mortgage deed contained the usual covenants of warranty against incumbrances.—CURRY v. AMERICAN FREEHOLD LAND MORTGAGE CO., OF LONDON, Ala., 18 South. Rep. 328.

60. INJUNCTION — Removal of Wall.—Injunction will lie to compel removal of the wall of a building placed by defendant on plaintiff's side of a boundary, there being no adequate and plain remedy at law.—NORTON v. ELWERT, Oreg., 41 Pac. Rep. 926.

61. INSURANCE—Dwelling House.—There is no rule of law in fire insurance declaring how near a carriage house must be to a dwelling house to belong with it.—ROBINSON v. PENNSYLVANIA INS. CO., Me., 32 Atl. Rep. 996.

62. INSURANCE—Conditions of Policy.—A stipulation in a fire policy, making it void if the building is mortgaged, will not avoid the policy where it was issued in pursuance of a parol contract, made without any question being asked as to the existence of a mortgage.—QUEEN INS. CO. OF LIVERPOOL, ENGLAND v. KLINE, Ky., 32 S. W. Rep. 214.

63. INTERPLEADER — When Allowed. — Whenever a person is possessed of property or funds, or owes a debt or duty to which more than one person lays claim, and the claims are of such a character as to render it doubtful or dangerous for the holder to act, he may apply to equity to compel the claimants to interplead.—CITY OF ATLANTA v. MCDANIEL, Ga., 22 S. E. Rep. 896.

64. INTOXICATING LIQUORS — Constitutional Law—Trial by Jury.—A prosecution in the police court under an ordinance prohibiting the unlawful sale of intoxicating liquors and the keeping of any place for conducting sales of the same, is criminal in its nature; and that clause of paragraph 1010, Gen. St. 1889, requiring the recognizance on an appeal in such case to be conditioned "for the payment of such fine and costs as shall be imposed" on the appellant if the case shall be determined against him, is an unreasonable restriction on the right of appeal, and in conflict with the constitutional guaranty that "the right of trial by jury shall be inviolate."—IN RE JAHN, Kan., 41 Pac. Rep. 956.

65. INTOXICATING LIQUORS—License.—When a license to retail liquors has been issued to a firm, and one of the partners has bought out the other, the license still protects the remaining partner in selling at the place and during the time for which it was issued.—COMMONWEALTH v. JAMES, Ky., 32 S. W. Rep. 219.

66. INTOXICATING LIQUORS — Criminal Prosecution.—Where an information charges the defendant, in general terms, with having sold intoxicating liquors contrary to the prohibitory law, and the information further alleges that the defendant had a permit issued by the proper county, and said information is attacked at the proper time by motion, held, that such information is insufficient.—STATE v. CONLEY, Kan., 41 Pac. Rep. 980.

67. JUDGMENT — Jurisdiction.—There can be no personal decree against a defendant who is not served with process, and who does not appear.—MCGAVOCK v. CLARK, Va., 22 S. E. Rep. 864.

68. JUDGMENT — Modification.—After the relator interpleaded in an insolvency proceeding, and recovered judgment on an interest in a fund arising from another judgment which had been assigned to him by the assignors, the court cannot, upon the petition of a witness in the action wherein said fund was recovered, modify the judgment in favor of relator so as to compel relator to pay to said witness his fees, though there was an agreement between said assignors and relator that the relator was to pay a portion of the costs.—STATE v. LANGHORNE, Wash., 41 Pac. Rep. 917.

69. JUSTICE OF THE PEACE — Default Judgment.—In case of default judgment before a justice of the peace for want of answer, there can be no review by appeal under 2 Hill's Code, § 1630, but only a review of errors of law by *certiorari* proceedings under section 1621.—STATE v. SUPERIOR COURT OF JEFFERSON COUNTY, Wash., 41 Pac. Rep. 895.

70. LIFE INSURANCE — Premium.—The liability of an insurance company for a return of premiums is by no means absolute, but depends upon the question whether the policy has ever become a binding contract between the parties.—MAILHOIT v. METROPOLITAN LIFE INS. CO., Me., 32 Atl. Rep. 989.

71. LIMITATIONS — Joint Debtors — Absence of One.—The absence from the State of one of several joint debtors suspends the statute of limitations as to all.—REYBOLD v. PARKER, Dela., 32 Atl. Rep. 981.

72. LIMITATIONS—Sufficiency of Acknowledgment.—A letter from a debtor to his creditor, offering to compromise an account, but containing no admission of the justice of the account, or any agreement to pay it, is not an acknowledgment sufficient to relieve the account of the bar of limitation.—GOLDSTEIN v. GAUS, Tex., 32 S. W. Rep. 185.

73. MALICIOUS PROSECUTION.—As a general rule, an action for malicious prosecution will not lie until the proceeding complained of has been legally terminated in favor of the defendant therein.—MURPHY v. ERNST, Neb., 64 N. W. Rep. 353.

74. MANDAMUS TO COUNTY BOARD—Parties.—In an action for a *mandamus* to compel the performance of a duty imposed upon the governing body of a corporation, such as a county board, it is proper to name as respondents, and direct the writ against, the individuals holding the offices in their official capacity.—COOPERRIDER v. STATE, Neb., 64 N. W. Rep. 372.

75. MASTER AND SERVANT—Negligence of Fellow-servant.—Plaintiff was employed to load onto cars and remove from a mine the ore as it was brought to the floor by the miners. It was the practice, as successive spaces were cleared of ore, to support the roof by timbers put in on notice from the miners or through the shift boss. Before a newly opened space had been put in condition for the timber men, and before they were notified that their services were required, plaintiff was injured by ore falling from the roof. There was evidence that too large a space had been mined, and that just before the accident the foreman's attention had been called to the roof, and he said that it was all right: Held that, if there was any negligence, it was that of a fellow-servant.—PETAJA v. AURORA IRON MIN. CO., Mich., 64 N. W. Rep. 335.

76. MECHANIC'S LIEN — Filing. — The provision in Code Civ. Proc. § 1187, requiring the claim filed by a mechanic's lien claimant to state "the name of the owner or reputed owner, if known," means the owner or reputed owner at time the claim is filed.—CORBETT v. CHAMBERS, Cal., 41 Pac. Rep. 873.

77. MECHANICS' LIENS — Against Public Building.—Though a mechanic's lien will not be enforced against a county building, notwithstanding the lien statute excepts no buildings from its provisions, yet, the contract of the county having provided that it should retain the money due the contractor to satisfy the claims of lienholders, the fund will be substituted for the building, and be subject to the liens.—ROE v. SCANLAN, Ky., 32 S. W. Rep. 216.

78. MORTGAGE FOR SUPPORT — Possession—Heirs of Mortgagor.—When the condition of a mortgage for maintenance is that the mortgagee shall be supported upon the mortgaged premises by the mortgagor, with no mention of the heirs, assigns, or other representatives of the mortgagor, such heirs are not entitled to the possession of the mortgaged premises, against the mortgagee.—RIDLEY v. RIDLEY, Me., 32 Atl. Rep. 1005.

79. MORTGAGES — Foreclosure — Notice.—A notice of foreclosure sale, by advertisement, which does not state the true date of the mortgage, is insufficient, and the sale made thereunder is illegal and void.—CLIFFORD v. TOMLINSON, Minn., 64 N. W. Rep. 381.

80. MORTGAGE — Foreclosure — Sale.—Where, by the terms of a mortgage, a power is conferred upon the mortgagee to sell the mortgaged property in satisfaction of the debt secured thereby, such stipulation does not impose upon the mortgagee such a special personal trust as that the sale thereunder could only be conducted by himself in person. The conduct of such a sale is a purely ministerial act, does not in any manner affect the real execution of the power, and may be performed by the mortgagee through the instrumentality of an auctioneer or any similar agent.—PALMER v. YOUNG, Ga., 22 S. E. Rep. 928.

81. MUNICIPAL CORPORATION — Tax Deeds as Evidence.—It was competent for a city in adopting its charter to provide that a tax deed of land sold by the proper officer for city taxes should be *prima facie* evidence of the regularity of the tax proceedings.—HOWE v. BARTO, Wash., 41 Pac. Rep. 908.

82. MUNICIPAL CORPORATIONS—Limitation of Indebtedness.—Const. art. 8, § 6, providing that no city "shall become indebted in any manner" over a certain amount, does not prohibit a city, indebted over said amount, from borrowing money to complete waterworks, where the loan was to be paid out of a special fund created by the receipts derived from such waterworks, without imposing any further liability on the general funds of the city.—WINSTON v. CITY OF SPOKANE, Wash., 41 Pac. Rep. 888.

83. MUTUAL BENEFIT INSURANCE — Change of Beneficiaries.—The interest of the beneficiary of a certificate in a benevolent association is not vested before the death of the member, but is a mere expectancy, which may be changed at any time by such member.—THOMAS v. GRAND LODGE OF ANCIENT ORDER OF UNITED WORKMEN OF WASHINGTON, Wash., 41 Pac. Rep. 882.

84. NEGLIGENCE — Evidence — Custom.—The usual practice adopted, within the limits of the experience of a civil engineer, in guarding fires kindled in clearing and grubbing on railroad locations, is not a safe criterion of the question of ordinary care, and evidence of such practice is immaterial and inadmissible.—PULSIFER v. BERRY, Me., 32 Atl. Rep. 987.

85. NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.—A child 12 years of age, and lacking in intelligence, who gets on a moving train at a street crossing, and is injured, may recover against the company, where its servants know, or might have known, that it was in a position of danger, and fail to exercise ordinary care to prevent injury to him.—THOMPSON v. MISSOURI, K. & T. RY. CO. IN TEXAS, Tex., 32 S. W. Rep. 191.

86. NEGLIGENCE — Pleading.—In an action for an injury to an employee engaged in making an excavation, caused by the falling of one of the piles put around the place to be excavated, the complaint alleging as negligence that the piles were "carelessly and improperly driven," and this being denied, the issue is not whether they were driven sufficiently deep, but whether they were driven carefully and properly.—JENKINS v. MCCARTHY, S. Car., 22 S. E. Rep. 883.

87. NEGOTIABLE INSTRUMENT—Note—Parties.—An attorney to whom a note is assigned for a nominal consideration, and for the purpose of collection only, has

such a title as will support an action on the note.—RIDDELL v. PRICHARD, Wash., 41 Pac. Rep. 905.

88. NEGOTIABLE INSTRUMENTS—Bona Fide Holders.—The fact that a surety of a note became such by the false representations of the maker is no defense as against one who took the note for value, without notice of such representations.—RILEY v. REIFERT, Tex., 32 S. W. Rep. 185.

89. NEGOTIABLE INSTRUMENT — Note—Consideration. Plaintiff bred three mares to defendant's stallion, and paid the service fee. They proved not to be in foal, and were returned, pursuant to agreement, the next year. Two of said mares again failed to be in foal, and plaintiff demanded a return of a proportionate part of the fee, whereupon defendant executed his promissory note for the amount demanded: Held, that the note was without consideration.—ROBERTS v. MILLION, Ky., 32 S. W. Rep. 220.

90. NEGOTIABLE INSTRUMENT — Contribution among Sureties.—If a note signed by a principal and two or more sureties is discharged by the execution and delivery of a new note executed by the principal and one of the sureties, and the surety is forced to pay the last note, this does not entitle him to, and he cannot, compel his cosurety or cosureties on the first note to contribute. The execution and delivery of the second note was not a payment of the first note by the surety alone. It but effected a change in the form of contract.—CHAPMAN v. GARBER, Neb., 64 N. W. Rep. 862.

91. NEW TRIAL.—Where a party moved for a new trial on the ground that the evidence was not sufficient to justify the verdict, and on other grounds, and it appeared that there was a substantial conflict in the testimony, the discretion of the court in granting the motion will not be reviewed on appeal, though it is not apparent upon what ground the motion was granted.—ROTTING v. CLEMAN, Wash., 41 Pac. Rep. 907.

92. OFFICE AND OFFICER—Official Bonds.—The sureties on the bond of a chief of police, who, by virtue of his office, was keeper of the jail, are not liable for the acts of such officer in receiving into the prison, without any process authorizing him so to do, persons who were arrested without probable cause to believe them guilty of crime.—MARQUIS v. WILLARD, Wash., 41 Pac. Rep. 889.

93. OFFICERS — Fees of Clerk. — When the law prescribes the duties of a public officer, and fixes the compensation of such officer, he must perform all the duties required of him by the law for such compensation.—HEALD v. POLK COUNTY, Neb., 64 N. W. Rep. 876.

94. PLEADING—Abatement—Federal Court.—A plea in abatement to a counterclaim in an action at law in a State court on the ground of the pendency in a federal court of another action between the same parties on the same subject-matter cannot be sustained.—CAINE v. SEATTLE & N. RY. CO., Wash., 41 Pac. Rep. 904.

95. PEDDLERS — License. — One whose business consists in going from house to house with rugs, making contracts of leasing at a stipulated amount weekly, the title passing to the party renting when the whole amount of the rental is paid, is a peddler, within an ordinance requiring peddlers to have a license.—PEOPLE v. SAWYER, Mich., 64 N. W. Rep. 833.

96. PARTNERSHIP — Actions between Partners.—A complaint by one member of a *de facto* corporation against the others as partners for their proportion of a debt contracted by the supposed corporation, and which he paid, must allege a settlement of the partnership accounts by which money was found due by the defendants to the firm, or ask for an accounting.—WARRING v. ARTHUR, Ky., 32 S. W. Rep. 221.

97. PARTNERSHIP — Retiring Partner. — The firm of J D P & Co. gave plaintiff a note, after which a notice was published, and seen by plaintiff, stating that the partnership formerly existing between J D P and A J G, under the firm name of J D P & Co., is dissolved, and that the business will be carried on under the firm name or J B G & Co., who will settle all claims of the late partnership. Afterwards plaintiff surrendered such note, and took a note signed "J B G & Co.," believing that J B G & Co. was a firm consisting of J B G and A J G; but there was in fact no such firm, the business being conducted under such name by J B G alone: Held, that A J G was liable on the new note.—THAYER v. GOSS, Wis., 64 N. W. Rep. 312.

98. RAILROAD CROSSINGS — Signals — Negligence.—A person who drives a team onto a railroad crossing at a time when a regular passenger train is about due, and neglects to look for an approaching train, which he might have seen in time to have avoided injury to himself if he had looked, is guilty of contributory negligence barring a recovery for an injury received from such train.—ROACH v. ST. JOSEPH & I. R. CO., Kan., 41 Pac. Rep. 966.

99. RAILROAD COMPANIES — Viaducts in Cities. — A city of the second class is vested with power to construct at its own expense, or to require the construction by a railroad company at its expense, of a viaduct or bridge over railroad tracks within the city, where the safety and convenience of the public make it necessary; and, when it is deemed to be just that the cost of such a structure should be divided between the city and the railroad company, the city may contribute or bind itself to pay a share of such cost.—CITY OF ARGENTINE v. ATCHISON, T. & S. F. R. CO., Kan., 41 Pac. Rep. 946.

100. RAILWAY COMPANIES — Guaranty of Bonds of Other Companies. — The statutes of Indiana provide that the board of directors of a railway company may, upon the petition of the holders of a majority of the stock of the company, direct the execution of a guaranty of the bonds of another company. The directors of the L. Ry. Co., an Indiana corporation, without any action by the stockholders, directed the execution of a guaranty of the bonds of the B. Ry. Co. The guaranty, as indorsed on the bonds, contained no representation that the stockholders had petitioned for its execution. The stockholders promptly disavowed the action of the directors: Held, that the guaranty was invalid, both as between the L. Ry. Co. and another corporation, at whose instance the guaranty was made, and as between the L. Ry. Co. and subsequent holders of the guarantied bonds, for value and without notice.—LOUISVILLE, N. A. & C. R. CO. v. OHIO VALLEY IMPROVEMENT & CONTRACT CO., U. S. C. C. (Ky.), 69 Fed. Rep. 431.

101. REMOVAL OF CAUSES—Suits against Receivers.—A suit against a receiver appointed by a federal court for a cause arising out of his management of the property committed to his charge is one arising under the laws of the United States, and may be removed from a State to a federal court, without regard to the citizenship of the parties or the nature of the controversy.—JEWETT v. WHITCOMB, U. S. C. C. (Wis.), 69 Fed. Rep. 417.

102. REPLEVIN — Execution. — When an officer levies on property under an execution, it is a seizure of the property, a taking the possession of the same, and it is then under the dominion of such officer.—CARR v. HUFFMAN, Kan., 41 Pac. Rep. 982.

103. RES JUDICATA — Assignment of Contract. — A building contract providing that it should not be assigned by the contractors without the consent of the other party did not prevent its assignment as collateral security for a loan to complete the building, and especially will the creditors of said contractors not be heard to question the validity of said assignment.—BOARD OF TRUSTEES OF SCHOOL DIST. NO. 1 v. WHALEN, Mont., 41 Pac. Rep. 849.

104. RES JUDICATA—Claim for Betterments.—Where, in an action to recover land, an intervener sets up a claim for betterments made by his grantors, and a decree for plaintiff recites that the claim made for betterments by the intervener cannot be set up in an answer but must be recovered in a direct action, such decree cannot, in a proper action by the intervener for

such betterments, be pleaded as *res judicata* of his right to claim them.—SALINAS v. C. AULTMAN & CO., S. Car., 22 S. E. Rep. 889.

105. SALE — Warranty.—Where the vendee said, during the negotiation of a trade, "If there is anything wrong with these mules, not discernible, I want you to tell me," and the vendor replied, "They are as sound as a dollar," and the trade was made on the faith of that statement, it amounted to a warranty of soundness.—RIDDLE v. WEBB, Ala., 18 South. Rep. 823.

106. SALE—Fraudulent Representations.—In support of plaintiff's claim that defendant sold him all of his land, and fraudulently left out of the deed a certain tract, and fraudulently concealed this fact, evidence is not admissible that defendant offered to sell his land to another, and, in pointing it out, included such omitted tract; this having been before the negotiations with plaintiff, and not in his presence.—GILBERT v. LEDFORD, Ky., 32 S. W. Rep. 223.

107. SCIRE FACIAS—Defaulting Witness.—A *scire facias* cannot issue against a defaulting witness to appear and show cause why a judgment should not be rendered against him where there is no judgment *nisi* upon which to base the *scire facias*.—ROGERS v. GOINS, Tenn., 32 S. W. Rep. 197.

108. SEDUCTION — Presumption of Chastity.—The words of the statute, "any unmarried female of previous chaste character," refer to those who have preserved their chastity and kept their persons from actual defilement.—MILLS v. COMMONWEALTH, Va., 22 S. E. Rep. 862.

109. SPECIFIC PERFORMANCE — Tender of Title.—Where, by the terms of a contract for the sale and conveyance of land, the purchase price is made payable in installments, and the conveyance is to be made upon the payment of the last installment, and where default is made by the purchasers in the payments, and no action is brought by the vendors to enforce the contract until after the maturity of the last installment, the obligations of the parties to the contract are mutual and dependent, and the vendors cannot maintain an action to specifically enforce the contract or to recover any part of the purchase money until they make or tender a conveyance of the land.—SOPER v. GABE, Kan., 41 Pac. Rep. 969.

110. TAXATION — Standing Trees.—Trees bought by a lumber company for the purpose of allowing them to stand for several years before cutting them are taxable in the county where they are situated, irrespective of the company's domicile.—COLDIRON v. KENTUCKY LUMBER CO., Ky., 32 S. W. Rep. 224.

111. TRESPASS.—A tenant is not liable as a trespasser for injury done by his hogs, which he has turned loose on the land, or for fence boards removed, while in possession after expiration of his lease to harvest a crop in which the owner has a joint interest.—TOLES v. MEDDAUGH, Mich., 64 N. W. Rep. 829.

112. TRESPASSING ANIMALS — Insufficient Fences.—Mill. & V. Code, § 2249, provides that a common rail fence, to be lawful, must be at least five feet high. Sections 2251-2253 provide that the owners of trespassing animals shall make satisfaction for the damages done by them on the cultivated land of another if the fence around such land be "sufficient," and that there shall be no such liability if the fence be "insufficient." Acts 1875, ch. 110 (Mill. & V. Code, §§ 2255-2257), provides that owners of notoriously mischievous stock allowed to run at large shall be liable for all damages done by the same to the inclosures or crops of others: Held, that a person whose crops are injured by the stock described in the act of 1875 may recover against the owner, though the former did not maintain a "sufficient" fence.—SMITH v. JONES, Tenn., 32 S. W. Rep. 200.

113. TOWN—Action by.—Sanb. & B. Ann. St. § 776, subd. 2, provides that the qualified electors of each town shall have power to direct the institution and defense of all actions in which the town is a party, and to employ all necessary agents for that purpose, etc. Rev. St. § 819, authorizes the supervisors of each town to see that all injuries to the property of the town are prosecuted for, etc.: Held, that an action by the town to enjoin defendant from obstructing a highway, and to recover damages therefor, cannot be maintained without authority from the electors.—TOWN OF WOODMAN v. BOHAN, Wis., 64 N. W. Rep. 826.

114. TRUST — Following Trust Funds.—When a bank, in which trust funds have been deposited, assigns for the benefit of its creditors, the *cestui que trust* can recover any portion of such funds that he can trace and identify in the hands of the assignee.—DOWIE v. HUMPHREY, Wis., 64 N. W. Rep. 815.

115. VENDOR AND PURCHASER — Enjoining Collection of Purchase Money.—Enforcement of a trust deed to secure payment of the purchase money of land will not be enjoined by reason of an ineffectual deed in the chain of title, where a deed perfecting the title is given.—MORGAN v. GLENDY, Va., 22 S. E. Rep. 854.

116. VENDOR AND PURCHASER — False Representations.—Liability on deferred purchase-money notes given for town lots, to a corporation engaged in exploiting the town, cannot be avoided on the ground of misrepresentation, where the purchasers knew that the scheme was speculative in character, and the company's prospectus was wholly promissory, and did not state falsely any existing fact, and where the only other representations relied on were those published in the daily press in regard to the company's condition, capital, prospects, etc., and which were not traced to any agents of the company.—WHITE v. EWING, U. S. C. C. of App., 69 Fed. Rep. 451.

117. VENDOR'S LIENS—Priority—Construction of Contract.—Defendant being unable to pay plaintiff a balance due on the purchase of the land, the latter agreed to extend the time of payment, provided T paid a portion of the money due. It was agreed that T was to be substituted to the lien of plaintiff, for the sum paid and any amount that he might thereafter pay, and that, when the whole was paid, plaintiff would deed to defendant and T in proportion to the amounts paid by them: Held, that T became a purchaser of the land to the extent of his payments, and that plaintiff's lien for the balance of the purchase money should be first paid, and after that the sums paid by T.—MCFARLAND v. MOOMAW, Va., 22 S. E. Rep. 865.

118. VENDOR AND VENDEE — Assumption of Mortgage Debt.—Under Civ. Code, § 2854, giving a creditor the right, on maturity of the debt, to the benefit of any security given to a surety, of the debt, a deficiency judgment may be rendered against a mortgagor's grantee who agreed "to hold the grantor harmless" against the mortgage.—HOPKINS v. WARNER, Cal., 41 Pac. Rep. 868.

119. WATER COURSE — Obstruction.—One not injured by the maintenance of a dam by which a mill is operated cannot, when sued by the mill owner for obstructing the natural flow of the stream to the mill, defend by setting up that the dam was constructed by plaintiff without proper authority.—WOODEN v. MT. PLEASANT LUMBER & MANUF'G CO., Mich., 64 N. W. Rep. 829.

120. WILL—Interest on Legacy.—A legacy of a certain sum payable to the legatee "when she shall arrive at 20 years old" is not payable with interest from the death of the testator to the time of payment.—CLINE v. SCOTT, Ex'r, Ky., 32 S. W. Rep. 215.

121. WILLS.—An instrument in writing, denominated on its face as a last will and testament, which purports to give no present interest in any property, but only the estate of which the makers die seised, signed by the parties, and delivered to the devisee therein named before the death of the makers, but which is not witnessed nor subscribed by any person other than the makers, is without legal force, either as a conveyance *inter vivos* or a will.—POORE v. POORE, Kan., 41 Pac. Rep. 973.